TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 13

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

FRED N. ACKER

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 2, 1958
CERTIORARI GRANTED JANUARY 19, 1959

[fol. 42] No. 13,320

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR REVIEW—Filed April 26, 1957

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit.

1. The Petitioner seeks review of the Decision of the Tax Court of the United States entered January 31, 1957 finding for the Respondent for the following years and amounts:

Year	Income Tax	Additions to Tax		
		Sec. 291(a)	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1947	$1,552.01	$388.00	$155.20	$ 93.12
1948	2,878.20	719.55	356.54	213.92
1949	1,215.36	342.09	151.16	90.70
1950	942.01		144.40	86.64

2. That the tax imposed originated in the 18th district of Ohio and was filed with the Commissioner in the City of Cleveland, Ohio.

3. The Petitioner seeks a review of the above decision by virtue of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

(SGD.) F. N. ACKER,
Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1958

No. 553

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

FRED N. ACKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1] Docket No. 53,555

IN THE TAX COURT OF THE UNITED STATES

FRED N. ACKER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

• • • •

[fol. 2] IN THE TAX COURT OF THE UNITED STATES

EXCERPTS FROM PETITION—Filed June 15, 1954

The Petitioner asks for a re-determination of the income tax liability set forth by the Commissioner of Internal Revenue in his notice of liability dated March 18, 1954 and as a basis of his proceedings alleges as follows:

1. That the tax imposed originates in the 18th district of Ohio. The alleged liability is for income taxes for the years 1947, 1948, 1949 and 1950 and aggregates the sum of $9,328.90 as follows:

		Penalties		
Year	Deficiency	Sec. 291-a	Sec. 294d-2	Sec. 294d-1-a
1947	$1,552.01	$388.00	$ 93.12	$155.20
1948	2,878.20	719.55	213.92	356.54
1949	1,215.36	330.84	90.70	151.16
1950	942.01	.....	86.64	144.40
Total	$6,587.28	$1,411.39	$484.38	$807.30

All as more fully set forth in Exhibit "A" attached to and made part of this petition.

2. The Petitioner brings into controversy all items of claimed Deficiency and Penalties except Dividends of $103.50 and Interest of $131.50. Consequently the amount involved is approximately $9,300.00.

3. The Petitioner alleges that the Commissioner erred in adding the following items of Deficiency and Penalties:

• • • •

[fol. 3] e). In imposing the following penalties under Section 294d-1-a of the Internal Revenue Code (Failure to file estimate):

Year 1947	$ 155.20
1948	356.54
1949	151.16
1950	144.40

f). In imposing the following penalties under Section 294d-2 of the Internal Revenue Code (Substantial underestimate of estimate):

Year 1947	$ 93.12
1948	213.90
1949	90.70
1950	86.64

[fol. 4] 4. The Petitioner bases his contention of error on the part of the Commissioner as follows:

* * * *

[fol. 5] e). The Petitioner maintains that there is no power in the Commissioner to impose any penalties under Section 294d-1-a of the Internal Revenue Code for failure to file a statement of estimated tax for the following reasons:

1. That under the facts and law of this case the powers of the Commissioner were exhausted by the imposition of the 25% penalty under Section 291-a of the Internal Revenue Code.

2. That the requirements of Section 294d-1-a are beyond the powers granted to the Congress of the United States because it implies the power of propheecy in the tax-payer which is not among the generally accepted attributes of the human species.

f). The Petitioner maintains there is no power in the Commissioner to impose any penalties under Section 294d-2 for substantial underestimation of estimate for the following reasons:

1. The defect of the parent section 294d-1-a communicates itself to defeat its dependent Section 294d-2.

2. The attempt to cumulate 294d-2 on top of section 294d-1-a is unwarranted under the law because the whole includes all of the parts.

• • • •

[fol. 6] • • •

• • • • •

[fol. 7] WHEREFORE the Petitioner prays that this Honorable Court re-determine the tax liability by eliminating the alleged Deficiency of $6,587.58 and Penalties of $2,741.32.

FRED N. ACKER.

(Verification omitted.)

[fols. 8-15] • • •

[fol. 16] IN THE TAX COURT OF THE UNITED STATES

EXCERPTS FROM ANSWER—Filed August 11, 1954

COMES NOW the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies, as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except it is denied that the amounts shown in the column headed "Sec. 291-a" correctly show the additions to tax asserted by the respondent with respect to section 291(a) of the Internal Revenue Code and as accurately set forth in Exhibit "A" attached to the petition.

2. Admits that the petitioner brings into controversy all items of claimed deficiency and penalties except dividends of $103.50 and interest of $131.50; denies the remaining allegations contained in paragraph 2 of the petition.

3. a) to f), inclusive. Denies the allegations contained in subparagraphs a) to f), inclusive, of paragraph 3 of the petition.

• • • •

4. e), f) and g). Denies the allegations contained in subparagraphs e), f) and g) and all subparagraphs and

subdivisions of subparagraphs c), f) and g) of paragraph 4 of the petition.

Denies generally each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

[fol. 17] WHEREFORE, it is prayed that this appeal be denied and that the respondent's determination be in all respects approved.

DANIEL A. TAYLOR, SEH
Chief Counsel,
Internal Revenue Service,
Counsel for Respondent.

Of Counsel:

CLARENCE E. PRICE,
Regional Counsel,

S. EARL HEILMAN,
Assistant Regional Counsel,

JAMES F. KENNEDY, JR.
Special Attorney,
Internal Revenue Service.

[fol. 18]

[fol. 19] IN THE TAX COURT OF THE UNITED STATES

EXCERPTS FROM OFFICIAL REPORT OF PROCEEDINGS BEFORE THE TAX COURT OF THE UNITED STATES

Courtroom No. 1,
Internal Revenue Building,
Washington D. C.,
Wednesday, June 6, 1956.

The proceedings in the above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE: HONORABLE STEPHEN E. RICE.

APPEARANCES:

FRED N. ACKER, ESQ., Petitioner, appearing on his own behalf.

JOHN J. LARKIN, ESQ., appearing on behalf of the Respondent.

* * * *

[fol. 20] STATEMENT BY MR. ACKER

Mr. Acker: * * *

[fol. 21] Now the next question is on the question of the failure to file. I am raising a constitutional point; that is, the failure to file an estimate on the ground that that is purely speculative, that it involves the power of prophecy, and it is a matter on which the Congress cannot legislate. And the next question involved, the Government takes the view that where you file no estimate at all and a tax is subsequently assessed, that that is a substantial underestimate of the estimate and therefore they can put on a double penalty.

The Court: Doubly so. The case is against you. The case was decided very recently, just two weeks ago.

Mr. Acker: Yes. I realize there are cases for and against on that, and of course I do not know how far they have (6) gotten beyond this court. It so happened I was involved in one of those cases, so I am thoroughly aware of that fact. I will of course take the case to the Court of Appeals, and I would expect this court I want to say to you more or less to take a position; that is, this court may

have felt that as the court administering this law it had to take that position, but that is argument of law rather than anything else.

* * * *

[fols. 22-31] * * *

* * * *

[fol. 32] COLLOQUY BETWEEN COURT AND MR. ACKER

Mr. Acker: * * *

Now on E, which is the question of the right of the (22) Government to demand an estimate, I deny that, and I am sincere in that. I don't file an estimate, and I have not at any time. I am willing to pay the price if I am wrong. No malice, just conviction.

And F goes along with the same idea on the theory that you cannot have the parts and the whole, and that of course is a legal question.

The Court: Of course we have already had a court review case on both of these points holding against you. I will have to hold against you, too. And the reconsideration only would be on appeal.

Mr. Acker: I can understand on these points, and I see that clearly. I get the attitude that the court has. I know that and appreciate that, and anticipate it.

The Court: All right.

* * * *

[fols. 33-35] * * *

* * * *

[fol. 36] IN THE TAX COURT OF THE UNITED STATES

MEMORANDUM FINDINGS OF FACT AND OPINION

Filed January 28, 1957

This proceeding involves the following deficiencies in income tax and additions thereto:

Year	Income Tax	Additions to Tax Sec. 291(a)	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1947	$1,552.01	$388.00	$155.20	$ 93.12
1948	2,878.20	719.55	356.54	213.92
1949	1,215.36	342.09	151.16	90.70
1950	942.01		144.40	86.64

[fol. 37] The issues to be decided are: (1) Whether respondent erred in determining that losses sustained by petitioner in 1947 and 1948 were deductible only as nonbusiness bad debts; (2) whether the respondent erred in determining that certain real estate taxes paid by petitioner in 1947, 1948, and 1949 were not allowable deductions under section 23(c) of the 1939 Code; (3) whether respondent erred in disallowing a deduction of $2,290 incurred by petitioner in 1950 for legal fees and a bond in connection with a legal proceeding; (4) whether there was reasonable cause excusing petitioner's failure to file declarations of estimate tax during each of the years in issue; and (5) whether the taxes and additions thereto sought to be imposed are so excessive as to constitute a taking of property without due process of law within the meaning of the Fifth Amendment of the Constitution.

Some of the facts were stipulated.

Findings of Fact

The stipulated facts are so found and are incorporated herein by this reference.

The petitioner, an attorney, was a resident of Cleveland, Ohio, during the years in issue. His returns for the years 1947, 1948, and 1949 were filed on October 2, 1952; his return for the year 1950 was filed on April 16, 1951. All such returns were filed with the former collector of internal revenue for the eighteenth district of Ohio.

In addition to his practice of law, petitioner, during the years in issue, was a stockholder or officer in several corporations. In 1947, he loaned one corporation in which he owned stock, $8,500, which loan became worthless during the year. He deducted such loss in full on his return for 1947. In determining the deficiencies herein, the respondent allowed the deduction of the loss as a nonbusiness bad debt.

In 1948, petitioner was forced to make good on his guaranty of the note of another corporation of which he was a stockholder, in the amount of $3,465.49. On his return for 1948, he deducted such payment in full. In de- [fol. 38] termining the deficiencies herein, the respondent allowed the loss as a nonbusiness bad debt.

In 1947, 1948, and 1949, petitioner paid taxes in the respective amounts of $990.86, $5,668.07, and $4,642.14 on certain land, the title to which was held by the Hall Road Land Company, a corporation. During those years, certain lots owned by the corporation were sold and the purchasers made payment to the corporation. Petitioner was the sole stockholder of the corporation and endorsed the checks in its name. A gain was realized on such sales but was not reported by petitioner on his income tax returns for such years.

In determining the deficiencies herein, respondent disallowed the deductions of the real estate taxes paid by petitioner.

In 1950, petitioner was convicted and imprisoned for wilful failure to file an income tax return for the year 1946. In connection with his defense, petitioner incurred legal fees in the amount of $2,200 and a bond cost of $90. Petitioner deducted such sums on his return for 1950. In determining the deficiencies herein, respondent disallowed such deductions.

Petitioner was not in the business of making loans to or guaranteeing loans of corporations during the years in issue.

Petitioner did not file declarations of estimated tax during any of the years in issue and failed to show reasonable cause excusing such failure to file.

Opinion

Rice, *Judge*: Petitioner appeared at the hearing in this case but filed no brief; nor did he ask for an extension of time within which to do so within the original time granted by the Court. At the close of the hearing, he stated: "I would be glad to have you rule against me on all of these things as a practical proposition because the more you rule against me the better my constitutional question becomes. And the amount of money involved does not concern me one whit. But if I am going to go [fol. 39] ahead with this case, I cannot have loose ends to say that I permitted the Government to take a judgment against me merely to create a special situation, and for that reason I am setting up the hardcore facts * * *"

Hence, although petitioner has not filed a brief, we do not deem the several issues with respect to the deficiencies to have been waived or conceded by him.

As to the issues with respect to the deduction of bad debt losses in 1947 and 1948 and the deduction of real estate taxes in those two years and in 1949, petitioner failed to carry his burden of proof. He offered no evidence except his own brief and wholly inadequate testimony as to the full facts surrounding both issues. Petitioner did not show that he was in the business of lending money to or financing corporations. The loss which he sustained in 1947 on the $8,000 loan to a corporation in which he was a stockholder is therefore deductible only as a nonbusiness bad debt. *Charles G. Beraciat*, 20 T. C. 808 (1953), affd. 211 F. 2d 575 (C. A. 3, 1954); *Jan G. J. Boissevain*, 17 T. C. 325 (1951). So also with respect to the loss sustained on his payment on the guaranty of the note of another corporation in 1948. Petitioner did not show that he was in the business of guaranteeing the loans of corporations, and the loss sustained by him in that year is deductible only as a nonbusiness bad debt. *Peter Stamos*, 22 T. C. 885 (1954); *George Arvedgood*, 21 T. C. 60 (1953); *Kate Baker Sherman*, 18 T. C. 746 (1952).

The respondent determined that the real estate taxes which petitioner paid in 1947, 1948, and 1949 were taxes paid on property owned by a corporation. Petitioner claimed that the corporation was a defunct entity but he nevertheless testified that it held title to land during the years in issue, sold such land, and received payment therefor in its name. He failed to prove his allegation that the corporation was merely his nominee, and the respondent's determination that his payment of taxes due by it was not deductible by him is sustained. *Sigmund Spitzer*, 23 B. T. A. 776 (1931).

[fol. 40] With respect to the legal fees and bond cost paid by petitioner in 1950 in his unsuccessful defense of the criminal action against him for failure to file an income tax return in 1946, he argues that such expenses were incurred to protect his reputation as an attorney and that his defense enhanced that reputation. That may be true; but, if so, it is of an incidental result of the

fact that the expenses were incurred in the unsuccessful defense of a criminal action and are therefore nondeductible. *C. W. Thomas*, 16 T. C. 1417 (1951); *Anthony Cornero Stralla*, 9 T. C. 801 (1947); cf. *Commissioner v. Heininger*, 320 U. S. 467 (1943).

Petitioner showed no reasonable cause excusing his failure to file declarations of estimated tax as required, and the additions to tax determined by the respondent under section 294(d)(1)(A) are accordingly sustained. We think petitioner's argument, stated in his petition, that the requirements of that section are beyond the powers granted to Congress because it implies power of prophecy on the part of a taxpayer is wholly without merit. Where no declarations of estimated tax are filed, the estimate is deemed to be zero and the respondent properly imposed additions to tax under section 294(d)(2) for substantial underestimate of estimated tax. *Marvin Marcy*, 26 T. C. — , filed August 31, 1956.

The petitioner attacked the imposition of the deficiencies and additions to tax here in issue on the grounds that the taxes proposed to be assessed against him are beyond the powers granted to Congress in Article I, Section 8 of the Constitution. This, he says, is so because the taxes sought to be imposed are so excessive as to constitute a confiscation of property without due process of law within the proscription of the Fifth Amendment. We think that argument without merit. It has long been recognized that where a taxing statute is within the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does not invalidate the taxing act. *McCray v. United States*, 195 U. S. 27 [fol. 41] (1904); *Chairmont L. Eqtredt*, 112 Ct. Cl. 80 (1948); *John A. Gebelein, Inc. v. Milhoan'd*, 12 F. Supp. 105 (D. Md., 1935); *Toque v. M'Elliott*, 274 F. 960 (S. D. N. Y., 1921).

Decision will be entered for the respondent.

IN THE TAX COURT OF THE UNITED STATES

DECISION—Entered January 31, 1957

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed January 28, 1957, it is

ORDERED AND DECIDED: That there are deficiencies in income tax and additions to tax under sections 291(a), 294(d)(1)(A), and 294(d)(2) of the 1939 Code, due from the petitioner for the taxable years 1947, 1948, 1949, and 1950, as follows:

Year	Income Tax	Additions to Tax		
		Sec. 291(a)	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1947	$1,552.01	$388.00	$155.20	$ 93.12
1948	2,878.20	719.55	356.54	213.92
1949	1,215.36	342.09	151.16	90.70
1950	942.01		144.40	86.64

(Signed) STEPHEN E. RICE,

Judge.

* * * *

[fol. 43] MINUTE ENTRY OF ARGUMENT AND SUBMISSION

(Omitted in printing)

IN UNITED STATES COURT OF APPEALS

JUDGMENT—Filed June 18, 1958

On petition to review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed insofar as it sustains the additions to tax under § 294(d)(2) of the Internal Revenue Code of 1939. In all other respects, the judgment is affirmed.

[fol. 44] No. 13320

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION for Review of Decision of the Tax Court of the United States

* * *

Before SIMONS, Chief Judge; MILLER, Circuit Judge, and MATHES, District Judge.

OPINION Decided June 18, 1958

MATHES, District Judge. The Tax Court sustained *in toto* respondent's determinations of deficiencies in petitioner's income tax and additions thereto under Int. Rev. Code of 1939: 291(a), 294(d)(1)(A), and 294(d)(2) for the years 1947-1950 inclusive.

Petitioner does not question here the correctness of the additions to tax under 291(a), but challenges the validity of all the deficiency determinations and additions to tax under 294(d)(1)(A) and 294(d)(2) for each of the years involved.

The facts, as set out in the Tax Court's Memorandum Findings of Fact and Opinion [16 CCH Tax Ct. Memo. 89 (1957)], are not in controversy. Petitioner is an attorney and a resident of Ohio. During the relevant period petitioner was a stockholder, in some instances the sole stockholder, in several corporations. All but one of the deficiency determinations in issue upon this review concern activities of petitioner with respect to one or more of those corporations.

Petitioner not only disputes the correctness of the Tax Court's application of the Code sections involved; he also [fol. 45] attacks the constitutionality in general of the income tax provisions of the Internal Revenue Code of 1939, and the constitutionality in particular of the requirement that a declaration of estimated tax be filed.

Inasmuch as the constitutional issues need not be reached if, as petitioner contends, the Tax Court incorrectly interpreted and applied the pertinent sections of the Internal Revenue Code of 1939, we turn first to the statutory questions. [See: *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568-575 (1947); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, 345-348 (1936) (concurring opinion of Mr. Justice Brandeis).]

In 1947, 1948, and 1949, petitioner personally paid real estate taxes on Ohio property owned by a corporation which in turn was wholly owned by him. Petitioner admits that title was kept in the corporation solely for his own convenience, that the property taxes were assessed against the corporation, and that within the period in question the corporation transacted business by selling some of the property. The Tax Court was clearly correct in sustaining respondent's determination that under the circumstances the property taxes were not deductible by petitioner. [Int. Rev. Code of 1939, 23 (c)-1; Treasury Regulation 111, 29.23(c)-1, 26 C.F.R. (1949); *Helvering* v. *Properties, Inc.*, 319 U. S. 436 (1943); *Maguire* v. *Supplee*, 316 U. S. 394 (1942); *Gilbert Corp.* v. *Commissioner*, 176 F. (2d) 141 (6th Cir. 1949); *Bolmes* v. *Commissioner*, 138 F. (2d) 779 (6th Cir. 1943); and see *Simon J. Murphy Co.* v. *Commissioner*, 231 F. (2d) 639 (6th Cir. 1956).]

In 1950 petitioner was convicted and imprisoned for willful failure to file an income tax return for 1946. In his unsuccessful defense of this criminal prosecution petitioner expended $2,290 for legal expenses and bond costs which he urges are deductible, apparently under Int. Rev. Code of 1939, 23(a), on the theory that defending against criminal charges is "an absolute necessity" for an attorney and that his fight in the criminal case greatly enhanced his reputation. The Tax Court properly sustained respondent's disallowance of this deduction. "A taxpayer who has been prosecuted under a federal or state statute and convicted of a crime has not been permitted a tax deduction for his attorney's fee." [*Commissioner* v. *Heininger*, 320 U. S. 467, 473 n. 8 (1943); *Estate of Albert E. MacCrone*, 14 CCH Tax Ct. Memo. 958 (1955), *aff'd. on this point and rev'd. on other grounds*, 240 F. (2d) 841 (4th Cir. 1956); see: *Tank*

[fol. 46] *Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30 (1958); *Hoover Motor Express Co.* v. *United States*, 356 U. S. 38 (1958).]

In 1947 petitioner loaned $8,500 to a corporation in which he owned stock, and the loan became worthless during that year. In 1948 petitioner was required to pay a note which he had guaranteed for another corporation in which he owned stock, resulting in a $3,466.49 loss to him. Respondent determined that both of these losses were deductible only as non-business bad debts, required to be treated as short-term capital losses [Int. Rev. Code of 1939, 23(k)(4)], and so subject to the amount limitation specified in 117(d)(2) of the Internal Revenue Code of 1939. The Tax Court found that petitioner failed to show that he was in the business of lending money to or guaranteeing the loans of corporations, and so sustained respondent's determinations. We agree. Treasury Regulation 111 29.23(k)-6, 26 C.F.R. (1949); *Putnam* v. *Commissioner*, 352 U. S. 82, 92-93 (1956); *Wheeler* v. *Commissioner*, 241 F. (2d) 883 (2d Cir. 1957); *Commissioner* v. *Stinchfield*, 240 F. (2d) 381 (2d Cir. 1957); and see *McNeill* v. *Commissioner*, 251 F. (2d) 863, 866-867 (4th Cir. 1958).]

For the years 1947 through 1950 respondent imposed on petitioner and the Tax Court sustained additions to tax, both under 294(d)(1)(A) for failure to file a declaration of estimated tax, and under 294(d)(2) for substantial underestimation of estimated tax. Petitioner does not rely on the statutory excuse of "reasonable cause and not due to willful neglect" as to his failure to file the declarations. Rather, he maintains that the statutory provisions requiring the filing of a declaration of estimated tax are unconstitutional because "the enumerated powers of the Congress do not include any power to compel a citizen to prophesy. It is beyond any human ability and therefore not a subject for Congressional intervention."

Since petitioner makes no attempt to establish the statutory excuse, the Tax Court correctly applied the statute in sustaining imposition of the additions to tax under 294(d)(1)(A) for failure to file the declarations of estimated tax. And we hold with the Tax Court that petitioner's attack upon the constitutionality of the pro-

visions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax, and imposing penalties for failure to file, is "wholly without merit." Such requirements are a valid exercise of the taxing [fol. 47] power conferred by Article I, S. and the Sixteenth Amendment of the Constitution. [*Erwin* v. *Granquist*, 253 F. (2d) 26 (9th Cir. 1958); *Walker* v. *United States*, 240 F. (2d) 601 (5th Cir.), *cert. denied*, 354 U. S. 939 (1957).]

Petitioner next contends that imposition of concurrent penalties under I. 294(d)(1)(A) and 294(d)(2) of the 1939 Code is without statutory warrant. The Tax Court held that petitioner's failure to file any estimate at all amounted to a zero estimate which, in turn, resulted in a substantial underestimate within the purview of 294(d)(2). This holding is in accord with Treasury Regulation 111, 29.294-1(b)(3)(i) [26 C.F.R. (1949)], and is supported by a long line of Tax Court decisions [see, among others: *Clarence E. Buckley*, 29 T. C. No. 50 (1957); *Marie Garrand*, 28 T. C. 1086, 1090 (1957); *Harold C. Harbat*, 28 T. C. 687, 692 (1957); *J. P. Abbott*, 28 T. C. 795, 808-809 (1957); *Anthony Delsanter*, 28 T. C. 845, 861-862 (1957); *Walter H. Kalkbrenner*, 28 T. C. 121, 126 (1957); *Marvin Marcus*, 26 T. C. 992, 996 (1956); *Harry Hartley*, 23 T. C. 353, 360, *modified*, 23 T. C. 564 (1954); *G. E. Fuller*, 20 T. C. 308, 316 (1953), *aff'd., on other grounds*, 213 F. (2d) 902 (10th Cir. 1954)], and by some District Court decisions [*Pehlivano* v. *United States*, 159 F. Supp. 98 (E. D. La. 1958); *Farmer* v. *United States*, 150 F. Supp. 581 (S. D. Ga. 1957); *Peterson* v. *United States*, 141 F. Supp. 382 (S. D. Tex. 1956)].

While this court has affirmed the Tax Court decisions which have sanctioned imposition of penalties under both 294(d)(1)(A) and 294(d)(2) where no declaration of estimated tax had been filed, examination of the briefs and appendices in those cases discloses that the propriety of imposing the penalty for substantial underestimation where no estimate at all had been filed was not raised in this court. [*John Fedorka*, 14 CCH Tax Ct. Memo. 652, 658 (1955), *aff'd., per curiam*, 237 F. (2d) 916 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957); *Robert Fogel*, 14 CCH Tax Ct. Memo. 718, 728 (1955), *aff'd., per curiam*,

237 F. (2d) 918 (6th Cir. 1956); *R. M. Clayton*, 15 CCH Tax Ct. Memo. 105, 109 (1956), *aff'd., per curiam*, 245 F. (2d) 238 (6th Cir. 1957).] The question remains open for examination then as *res integra* here.

Even though this problem of concurrent penalties exists only under the 1939 Code, and cannot arise under the 1954 Code which expressly provides but a single penalty for underpayment of estimated tax [Int. Rev. Code of 1954, §§ 6651(c), 6654, and see 3 U. S. Code Cong. & Ad. News (1954) 4544, 4567, 5241-5242], the problem [fol. 48] remains an important one because of cases yet to be decided which will be ruled by the 1939 Code [see Int. Rev. Code of 1954, § 6654(d)].

The argument in support of the validity of that part of Treasury Regulation 111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)] declaring that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero," has been well stated in *Palmisano* v. *United States*, *supra*, 159 F. Supp. 98, and *Farrow* v. *United States*, *supra*, 150 F. Supp. 581. [See also *G. E. Fuller*, *supra*, 20 T. C. at 316.]

But to give effect to the quoted regulation presents a problem even greater than the logical difficulty encountered in saying that one who has filed no estimate at all has thereby underestimated his tax. [See *Barnwell* v. *United States*, 58-1 U.S.T.C. Par. 9374 (E. D. S. C. Feb. 4, 1958).] For although the Congress treated failure to file a declaration of estimated tax and substantial underestimation of tax as separate and distinct acts under the 1939 Code, and provided separate and different penalties for each, the regulation renders a taxpayer who has failed to file a declaration ipso facto subject to both the penalty for failure to file and the penalty for substantial underestimation. As the Tax Court itself observed in rebuffing another attempt of respondent to extend these penalties by implication: "If the legislature had intended such a result it would have had been a simple matter so to provide." [*Anthony Delsanter*, *supra*, 28 T. C. at 862.]

Moreover, inasmuch as the regulation imposes a penalty in addition to one expressly imposed by the statute

itself for the same omission, we are unable to perceive wherein the regulation is necessary to effectuate the statutory taxing scheme. Section 294(d) of the Internal Revenue Code of 1939 is penal in nature and to be strictly construed. [*Stephen* v. *Commissioner*, 197 F. (2d) 712 (5th Cir. 1952); *Barnacll* v. *United States*, *supra*, 58-1 U.S.T.C. Par. 8374; *Davis* v. *Dudley*, 124 F. Supp. 426, 429 (W. D. Pa. 1954); see *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284, 296 (1954).] "Penalties are never extended by implication" [*Elliott* v. *Railroad Co.*, 99 U. S. 573, 576 (1878); *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472 (2d Cir. 1930)], and "all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfried, Inc.* v. *Commissioner*, 162 F. (2d) 628, 633 (3rd Cir. 1947).]

Furthermore, even if the exactions involved be treated as "additions to Tax," as they are denominated by § 294 [fol. 49] of the 1939 Code, the regulation runs counter to the long established rule that "statutes levying taxes . . . are not to be extended by implication beyond the clear import of the language used." [*United States* v. *Merriam*, 263 U. S. 179, 187-188 (1923); *Crooks* v. *Harrelson*, 282 U. S. 55, 61 (1930); *Reinecke* v. *Gardner*, 277 U. S. 239, 244 (1928); *Gould* v. *Gould*, 245 U. S. 151, 153 (1917); *cf. Parker Pen Co.* v. *O'Day*, 234 F. (2d) 607, 609 (7th Cir. 1956).]

Mindful of the cogent reasoning of the Tax Court and District Court opinions sustaining the regulation, we nevertheless are of opinion that Treasury Regulation 111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)] is invalid insofar as it provides that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero." In so holding we are mindful too that, as the Tax Court and the District Courts have pointed out, Treasury regulations are presumptively valid. But we think that in this instance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, "unreasonable and plainly inconsistent with the revenue [statute]," and so cannot be sustained. [*Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).]

This conclusion is buttressed by the fact that it is in accord with that reached by the majority of the District Courts which have considered the problem. [*Barnwell v. United States*, *supra*, 58-1 U. S. T. C. Par. 9374; *Erwin v. Granquist*, 57-2 U. S. T. C. Par. 9732 (D. Ore. 1957), *aff'd.*, 253 F. (2d) 26 (9th Cir. 1958); *Powell v. Granquist*, 146 F. Supp. 308, 312 (D. Ore. 1956), *aff'd.*, 252 F. (2d) 56 (9th Cir. 1958); *Jones v. Wood*, 151 F. Supp. 678 (D. Ariz. 1956); *Stokes v. United States*, 150 F. Supp. 364 (N. D. Cal. 1957); *Hodgkinson v. United States*, 57-1 U. S. T. C. Par. 9294 (S. D. Cal. 1956); *Owen v. United States*, 134 F. Supp. 31, 39 (D. Neb. 1955), *modified on another point sub nom. Knop v. United States*, 234 F. (2d) 760 (8th Cir. 1956); *Todd v. United States*, 57-2 U. S. T. C. Par. 9768 (N. D. Ga. 1957); *Glass v. Dunn*, 56-2 U. S. T. C. Par. 9840 (N. D. Ga. 1956); *United States v. Ridley*, 127 F. Supp. 3, 11 (N. D. Ga. 1954); *United States v. Ridley*, 120 F. Supp. 530, 538 (N. D. Ga. 1954).]

The judgment of the Tax Court must therefore be reversed as to the additions to tax under § 292(d)(2). However, our conclusion that the claimed deductions were properly disallowed compels us nonetheless to reach [fol. 50] the constitutional issues raised as to the income tax provisions of the Internal Revenue Code of 1939.

Petitioner asserts that these income tax provisions are unconstitutional because: (1) the rates are so high as to make the levy not a tax but a confiscation of property contrary to the Fifth Amendment to the Constitution, (2) the progressive rates are unconstitutional, and (3) the "income tax law considered as a whole in its excessive rates and arbitrary provisions is openly subversive of the fundamental philosophy of the Constitution of the United States and repugnant to its continued existence."

The Tax Court summarily disposed of these constitutional issues with the statement: "It has long been recognized that where a taxing statute is within the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does not invalidate the taxing act." [16 CCH Tax Ct. Memo. at 91.]

This declaration by the Tax Court completely over-

looks petitioner's arguments by assuming the very thing that he disputes, namely, whether the Congress has the power to enact an income tax law like that found in the Internal Revenue Code of 1939.

While holding that the court may not disturb the judgment of the Congress because of indirect effects of a statute that clearly represents an exercise of the taxing power [see, for example, *McCray* v. *United States*, 195 U. S. 27 (1904)], on more than one occasion the Supreme Court has adverted to the possibility that a law, although denominated a taxing statute, might not be a taxing statute at all, but one which on its face has crossed the boundary from the classification "tax" to the classification "taking," so as to become subject to the limitations of the Fifth Amendment to the Constitution. [*Stewart Machine Co.* v. *Davis*, 301 U. S. 548, 585 (1947); *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24 (1916).]

We know of no authority holding that the Congress may constitutionally enact a law which, although called a tax statute, on its face amounts to a taking of private property without compensation therefor. That such a law would fall within the area of "taking," rather than the area of "taxing," and so be subject to judicial nullification because of the limitations of the Fifth Amendment was clearly recognized by Mr. Chief Justice White speaking for the Court in *Brushaber* v. *Union Pacific R. R.*, [fol. 51] *supra*, 240 U. S. 1, where he pointed out that, despite the breadth of the taxing power conferred by the Constitution, there might arise "a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." [240 U. S. at 24-25.]

This principle was also recognized by Mr. Justice Cardozo speaking for the Court in *Stewart Machine Co.* v. *Davis*, *supra*, 301 U. S. 548, when he wrote: "[W]e assume that discrimination, if gross enough, is equivalent

to confiscation and subject under the Fifth Amendment to challenge and annulment." [301 U. S. at 585.] Nor do we forget the ringing words of Mr. Justice Holmes when, in dissent, he declared: "The power to tax is not the power to destroy while this Court sits." [*Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928).]

Since the Tax Court applied an incorrect legal standard in judging petitioner's claim of unconstitutionality, it would be proper to remand the case to enable that court to weigh the evidence in light of correct legal standards. However, on surveying the entire record from which it appears that petitioner fully presented to the Tax Court both his constitutional arguments and his evidence supporting them, we think there is no reasonable basis in fact or law for a holding that the income tax provisions of the Internal Revenue Code of 1939 are unconstitutional either on their face or as applied to petitioner in this case.

The 1939 Code is unquestionably a taxing statute in substance as well as in name. The constitutionality of progressive tax rates is long settled. [*Knowlton* v. *Moore*, 178 U. S. 41 (1900); *Brushaber* v. *Union Pacific R. R.*, *supra*, 240 U. S. 1.] The classifications drawn in question here do not appear to be either arbitrary or unreasonable in any constitutional sense. To the contrary, in large part they represent "the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." [*Burnet* v. *Wells*, 289 U. S. 670, 676 (1933).] [fol. 52] Nor can we say that the rates of tax, admittedly high, have reached confiscation or a "taking" in the constitutional sense. Much as we may sympathize with petitioner's arguments about our tax plight, as judges we must say that he has addressed them to the wrong forum: they are for the Congress, and not for the courts.

For the reasons stated, the judgment of the Tax Court is reversed insofar as it sustains the additions to tax under 293(d)(2) of the Internal Revenue Code of 1939, but in all other respects the judgment is affirmed.

[fol. 53] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,320

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

PETITION OF THE RESPONDENT FOR REHEARING
Filed July 7, 1958

To The Honorable United States Court of Appeals for the Sixth Circuit and to the Judges Thereof:

The Commissioner, by his attorneys respectfully presents this petition for rehearing in this case in which an opinion, by the Honorable Judge Mathes, was rendered on June 18, 1958. The reasons for this petition for rehearing are as follows:

This Court concluded that Treasury Regulations 111, Section 29.294-1(b)(3)(i)(A), was unreasonable and invalid insofar as it provided that if a declaration of estimated tax was not filed then the amount of the estimated tax is zero for purposes of the addition to the tax on account of the substantial understatement of estimated tax provided by Section 294(d)(2) of the Internal Revenue Code [fol. 54] of 1939. This Court stated in its opinion "we think that in this instance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, 'unreasonable and plainly inconsistent with the revenue [statute],' and so cannot be sustained" (Slip

Op. 6.) However, in view of the legislative history of Section 294(d)(2) we respectfully submit that the Court's conclusion is untenable.

Although the Commissioner did not set forth in his brief the legislative history involved in detail, the leading Tax Court case of *Fuller v. Commissioner*, 20 T.C. 308, affirmed on other grounds, 213 F. 2d 162 (C.A. 10th), which discusses that history, was cited, as well as other decisions. We respectfully urge that the Treasury Regulation in question could hardly be inconsistent with the statute (Section 294(d)), as this Court said (Slip. Op. 6), because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute. Treasury Regulations 111, Section 29.294-1(b)(3)(A), as amended by T.D. 5403, 1944 Cum. Bull. 349, provides:

> In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

In explaining the addition to the tax for substantial underestimate of tax when it was added to Section 294 in 1943 (Section 5(b), Current Tax Payment Act of 1943, [fol. 55] c. 120, 57 Stat. 126) in both the Senate Report and the Conference Report (S. Rep. No. 221, 78th Cong., 1st Sess., p. 42 (1943 Cum. Bull. 1314, 1345); H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 56 (1943 Cum. Bull. 1351, 1372)) it was stated:

> In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision will be zero.

In the leading Tax Court case of *Fuller v. Commissioner*, *supra*, an attack on the above-quoted Treasury Regulation was rejected in the following language (p. 316):

> The petitioners attack the regulation as being void in that it is short of the will of Congress. The regulation is couched in the same language used by Congress in its Conference Report on legislation covering this subject and follows the procedure therein prescribed. In short, petitioners argue that the regulation

actually reflects, rather than distorts, the will of Congress, and we uphold its validity.

This Court's statement that "the regulation renders a taxpayer who has failed to file a declaration *ipso facto* subject to both the penalty for failure to file and the penalty for substantial underestimation" (Slip. Op. 5) also seems, we respectfully submit, untenable. If Congress had not intended both additions to the tax to apply it could easily have so provided as it provided in Section 294(d)(1)(B) regarding the addition for failure to pay installments of estimated tax. The addition in [fol. 56] Section 294(d)(1)(B) for failure to pay is expressly limited to cases where a declaration of estimated tax was filed. Section 294(d)(2) providing for the addition to the tax for substantial underestimation has no similar provision making its addition and the failure to file addition of Section 294(d)(1)(A) interdependent. If no declaration of estimated tax is filed and the estimate is zero for purposes of the addition for substantial underestimation, as both the Committee Reports and the Treasury Regulation provide, it seems to follow that the addition for substantial underestimation must be imposed whenever no declaration is filed. In fact, the Court of Appeals for the Third Circuit has just reached a similar conclusion as shown by its remark in *Kaltreider* v. *Commissioner*, decided May 21, 1958 (1 A.F.T.R. 2d 58-1766):[1]

> The penalty for substantial underestimation of estimated tax under Section 294(d)(2) is not subject to a reasonable cause limitation nor indeed to any other defense. Where no declaration of estimated tax is filed the estimate is considered to be zero and the penalty mandatory.[19]

* * * *

[19] *Clark* v. *Commissioner* [253 F. 2d 745 (C.A. 3d)]; Treasury Regulations 111, Sec. 29.294-1(b)(2)(A).

[1] The imposition of both additions to the tax for failure to file and for substantial underestimation likewise was not distributed in the Fifth Circuit's case of *Anderson* v. *Commissioner*, 250 F. 2d 242, and in the Ninth Circuit's case of *Baumgardner* v. *Commissioner*, 251 F. 2d 311.

[fol. 57] That the additions to tax may be imposed for both failure to file the declaration and for a substantial underestimate in the same taxable year is also shown by the Committee Reports to the 1954 Code. The 1954 Code eliminated the addition to tax for failure to file a declaration (Section 6651(d) (26 U.S.C. 1952 ed., Supp. II, Section 6651)) except in the case of wilful failure (Section 7203 (26 U.S.C. 1952 ed., Supp. II, Section 7203)). The 1954 Code combined the three additions into a single one for underpayment of the estimated tax and based the addition upon 6% per annum of the amount of the underpayment for the period of the underpayment (Section 6654 of the 1954 Code (26 U.S.C. 1952 ed., Supp. II, Section 6654)).

In explaining this change the Committee Reports point out that the 1939 Code additions to tax for failure to file and for a substantial underestimate would both apply for the same taxable year (H. Rep. No. 1337, 83d Cong., 2d Sess., p. 100 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4127)):

> Additional charges are imposed under the present law for failure to file a declaration or make a payment of the estimated tax or for substantial underestimates of tax liability. These charges may be severe. For failure to file a declaration or to pay an installment of the estimated tax, the total charge may be as high as 9 percent of the unpaid installment. For a substantial underestimate of tax, that is, an estimated tax which is less than 80 percent of the actual tax liability for the year (66 2/3 percent in the case of farmers), a charge of 6½ percent [fol. 58] of the amount by which the final tax liability exceeds the estimated tax may be imposed. This charge and the charge for failure to file a declaration or pay an installment of estimated tax may run concurrently and result in a combined charge of 15 percent of the estimated tax due.

See also, S. Rep. No. 1622, 83d Cong., 2d Sess., p. 135 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4769).

*It is true, as this Court observed (Slip Op. 6), that there are District Court cases holding that the addition to tax under Section

We submit, therefore, that the language of Treasury Regulation, Section 29.294-1(b)(3)(A), is fully in accord with the language of Section 294(d)(1)(A) and (d)(2) of the statute and with the legislative history of the section's enactment which shows a clear intent that both additions should be applicable for the same taxable year.

The Regulations must be sustained unless unreasonable and plainly inconsistent with the statute which they interpret; they are not to be overruled except for weighty reasons. *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501, rehearing denied, 334 U. S. 813; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100; *Brewster* v. *Gage*, [fol. 59] 280 U.S. 327. Moreover, the Regulations "long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law". *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Gas Blass Co.* v. *Commissioner*, 204 F. 2d 327 (C.A. 8th). Congress has seen fit to legislate with respect to the sections of the Code here involved several times since 1943.[3] It has in no way indicated disapproval of the Treasury Department's interpretation of the statute as reflected in

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294(d)(2) cannot be applied where no declaration of estimated tax was filed. These cases stem from *United States* v. *Ridley*, 120 F. Supp. 530 (N.D. Ga.), and we do not believe that these cases are sound. The Revenue Service has announced it will adhere to *Fuller* v. *Commissioner*, *supra*, and will not follow *United States* v. *Ridley*, *supra*. Rev. Rul. 55-224, 1955-1 Cum. Bull. 414.

[3] The provisions of the Code involved are Section 58 relating to the requirement of filing a declaration of estimated tax, Section 59 relating to payment of the estimated tax; Section 60 relating to special rules for application of Sections 58 and 59, Section 291 relating to the failure to file a return and Section 294 relating to additions to the tax in case of nonpayment, etc. The following amendments and reenactments have occurred without disturbing the regulative provision here involved. Section 118, Revenue Act of 1943, c. 63, 58 Stat. 21; Section 13, Individual Income Tax Act of 1944, c. 210, 58 Stat. 234; Section 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110; Section 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136; Section 208(d)(4), Social Security Act Amendments of 1950, c. 809, 64 Stat. 477; Section 221(g), Revenue Act of 1950, c. 994, 64 Stat. 906; and Section 103(b), Revenue Act of 1951, c. 521, 65 Stat. 452.

its Regulations. The re-enactment doctrine should have, therefore, considerable force. *Helvering* v. *Winmill*, *supra*.

WHEREFORE, it is respectfully urged that this petition for rehearing be granted and that this Court's opinion dated June 18, 1958, be modified so as to sustain the [fol. 60] validity of the Treasury Regulation, Section 29.294-1(b)(3)(A), and uphold the Tax Court's decision that imposition of the additions to the tax for failure to file and for substantial underestimation was proper.

Respectfully submitted,

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July, 1958.

[fol. 61] CERTIFICATE OF COUNSEL

(Omitted in printing)

[fol. 62] No. 13320

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRED N. ACKLE, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER ON PETITIONS FOR REHEARING
Filed September 3, 1958

Petition for Review of Decision of the Tax Court of the United States.

Before: SIMONS, Chief Judge, MILLER, Circuit Judge, and MATTHES, District Judge.

PER CURIAM.

Each party has petitioned for a rehearing. Petitioner but restates a portion of his earlier argument.

Respondent, however, now advances the contention that "the Treasury Regulation in question could hardly be inconsistent with the statute . . . because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute." [Compare Treasury Regulation 111 29.294-1(b)(3)(i), 26 C.F.R. (1949) with S. Rep. No. 221, 78th Cong., 1st Sess. 42 (1942 Cum. Bull. 1314, 1345), and H. R. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943 Cum. Bull. 1351, 1372).]

Respondent also calls to our attention the recent decisions of *Patchen* v. *Commissioner*, . . . F. 2d . . . (5th Cir., July 23, 1958), *Abbott* v. *Commissioner*, . . . F. 2d . . . (3rd Cir., July 31, 1958), and *Hanson* v. *Commissioner*, . . . F. 2d . . . (9th Cir., Aug. 4, 1958). These decisions, rendered [fol. 63] subsequent to the publication of our opinion in this case, express disagreement with our holding that the penalty for failure to file a declaration of estimated tax [Int. Rev. Code of 1939, 294(d)(1)(A)] and the penalty for substantial underestimation of estimated tax [*id.*

294(d)(2)] cannot be imposed concurrently so as to work the exaction of a double penalty.

In the *Patchen* case the learned Court of Appeals for the Fifth Circuit appears to credit as authority decisions of this Court in which the problem was never raised. [See footnote 15 citing *Engel v. Commissioner*, 237 F. 2d 918 (6th Cir. 1956) and *Clarion v. Commissioner*, 245 F. 2d 238 (6th Cir. 1957).] See also 5 Rabkin, Federal Income Taxation Par. 153 at page 191 (Aug. 8, 1958).]

In the *Abbott* case the learned Court of Appeals for the Third Circuit recognizes that: "An examination of the underestimation provisions of Section 294(d)(2), taken alone, leaves unanswered the question of whether the penalty provided should be imposed where no declaration of estimated tax is filed." [*Abbott v. Commissioner*, *supra*, ... F. 2d at ....] The Court then observed that "[t]he statute being ambiguous, resort to legislative history is proper in an endeavor to ascertain Congressional intent" [*Ibid.*] and concluded from the legislative history that the Congress intended the double penalty since "the regulation is precisely in accord with the Congressional intent expressed in the conference report." [*Ibid.*]

In the *Hancock* case the learned Court of Appeals for the Ninth Circuit likewise got lodged from the legislative history that "[n]o other conclusion is possible but that Congress intended" to provide in the Act for the double penalty. [*Hancock v. Commissioner*, *supra*, ... F. 2d at ....]

However, it has long been our view that "such an [intention of the Congress must be gathered from the language of the Act. . . ." [*United States v. Strang*, 109 F. 2d 891, 893 (6th Cir. 1940); see also *Hopkins v. Commissioner*, 144 F. 2d 683, 692 (6th Cir. 1944).]

"Further", as the Court of Appeals for the Third Circuit has pointed out on another occasion, "it is well settled that in the application of penalties, all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfield, Inc. v. Commissioner*, 162 F. 2d 628, 633 (3rd Cir. 1947).]

[fol. 64] While our great respect for the learning and acumen of the Courts of Appeals for the Third, Fifth, and Ninth Circuits naturally gives us pause, we are none

theless of opinion that the challenged regulation authorizing imposition of double penalties cannot be validated by the fact that it is substantially a quotation from the Congressional committee reports.

It seems to us a policy of first order that taxpayers under this "government of laws and not of men" be entitled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval. [U. S. Const. Art. I, § 7, cls. 2, 3; Amend. XVI; see *Landstaff v. Lucas*, 9 F. 2d 691, 692-693 (W.D. Ky. 1925), *aff'd upon the opinion of the District Court*, 13 F. 2d 1022 (6th Cir.), *cert. denied*, 273 U.S. 721 (1926); *Massachusetts Corp. v. Higgins*, 194 F. 2d 257, 260 (5th Cir. 1952); *Helvering v. Reisman Motors, Inc.*, 128 F. 2d 584, 587-588 (5th Cir. 1942).]

Especially is this so where, as in the case at bar, the penalty sought to be imposed by administrative regulation is cumulative with and in addition to another penalty clearly and expressly imposed by the statute for the identical omission. Such a regulation is an attempted expansion and extension of the statute tantamount to an amendment thereof, and neither "presumptions of validity" nor "reenactment doctrines" can serve to validate it. [*United States v. Calamaro*, 354 U.S. 351, 358-359 (1957); *Koshland v. Helvering*, 298 U.S. 441, 446-447 (1936); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134-135 (1936); *Lincoln Elec. Co. Employees' Profit Sharing Trust v. Commissioner*, 191 F. 2d 320, 330 (6th Cir. 1951); *Landstaff v. Lucas*, *supra*, 9 F. 2d at 692-693; see *United States v. Hearst*, 197 F. 2d 803, 805 (9th Cir.), *cert. denied*, 344 U.S. 855 (1952).]

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law." [*Merrill v. Jones*, 106 U.S. 466, 467 (1882).]

Each of the petitions for rehearing is denied.

* * * *

(fol. 65) Clerk's Certificate to foregoing transcript omitted in printing

[fol. 66] SUPREME COURT OF THE UNITED STATES

No. 553, October Term, 1958

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

FRED N. ACKER

ORDER ALLOWING CERTIORARI—JANUARY 19, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRED N. ACKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRED N. ACKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 36a–41a) are not officially reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 10–21) is reported at 258 F. 2d 568. The opinion of the Court of Appeals on the petitions for rehearing (Appendix A, *infra*, pp. 22–25) is reported at 258 F. 2d 575.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958. (Appendix A, *infra*, p. 21.)

The petitions for rehearing were denied on September 3, 1958. (Appendix A, *infra*, pp. 22–25.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Where a taxpayer fails to file any declaration of estimated income tax as required by Section 58 of the Internal Revenue Code of 1939, whether the Commissioner may impose an addition to the tax under Section 294 (d) (2) of the 1939 Code for substantial underestimation of tax, as well as an addition under Section 294 (d) (1) (A) for failure to file a declaration.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Sections 58, 59, 294 (d) (1) and (2) of the Internal Revenue Code of 1939 and Section 29.294–1 of Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, are set forth in Appendix B, *infra*, pp. 26–33.

STATEMENT

The relevant facts on the issue presented by this petition,[1] which are not in dispute, and as found by both courts below (R. 37a, 38a; Appendix A, *infra*, pp. 10, 13), may be summarized as follows:

The taxpayer is an attorney. During the years 1947 through 1950, inclusive, he failed to file any declaration of estimated tax. There was no reason-

[1] There were other issues involved in the Tax Court and Court of Appeals proceedings but these were decided in favor of the Commissioner. Accordingly, the facts relating to these other issues have not been included here.

able cause for such failures. The Commissioner, relying upon Section 294 (d) (1) (A) and Section 294 (d) (2) of the 1939 Code, respectively, imposed additions to the tax for each of the years involved for failure to file any declaration and also for substantial underestimation of the tax. (R. 37a, 38a; Appendix A, *infra*, pp. 10, 13.) The Tax Court sustained this action of the Commissioner. (R. 40a.) The Court of Appeals reversed as to the addition for substantial underestimation, holding that it could not be imposed concurrently with the addition for failure to file a declaration. (Appendix A, *infra*, pp. 14–18, 22–25.)

REASONS FOR GRANTING THE WRIT

1. The decision below, which involves an important issue affecting many taxpayers, is in direct conflict with rulings of the Third Circuit in *Abbott* v. *Commissioner*, 258 F. 2d 537, the Fifth Circuit in *Patchen* v. *Commissioner*, 258 F. 2d 544, and the Ninth Circuit in *Hansen* v. *Commissioner*, 258 F. 2d 585. See also *Kilborn* v. *Commissioner* (C. A. 5th), decided September 18, 1958 (58–2 U. S. T. C., par. 9847). There are no material factual differences in these cases, and the legal issue posed in each of them is the same.

Section 58 of the Internal Revenue Code of 1939 (Appendix B, *infra*, pp. 26–27) requires a taxpayer to file a declaration of estimated tax for the current year. Section 59 (Appendix B, *infra*, pp. 27–29) requires quarterly payments of the estimated tax. To

[2] This Court granted the Government's petition for a writ of certiorari in *Hansen* (October Term, 1958, No. 380) on November 10, 1958, with respect to the other issue involved in that case relating to the accruability of dealer reserve accounts.

enforce these provisions Section 294 (d) (1) (A) and (B) (Appendix B, *infra*, pp. 29–30) provides for an addition to the tax for failure to file a declaration *or* for failure to pay installments of the estimated tax declared. The additions under subparagraphs (A) and (B) are not to be imposed concurrently, and they may not be imposed where reasonable cause has been shown by the taxpayer. The maximum addition under these provisions is 10 per cent of the unpaid portion of the tax.

Section 294 (d) (2) (Appendix B, *infra*, pp. 30–31), on the other hand, provides for an addition to the tax for substantial underestimation,[3] and in the present case this latter addition consisted of 6 per cent of the amount by which the final tax exceeded the estimated tax.[4] Section 29.294–1 (b) (3) of Treasury Regulations 111 (Appendix B, *infra*, pp. 31–33) provides that, in the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of determining the addition to the tax for substantial underestimation shall be zero.

The decision below holds that this provision of the Regulation is invalid,[5] and that it cannot be sustained

[3] It is clear that the imposition of the addition for underestimation is not excusable for reasonable cause. *Kaltreider* v. *Commissioner*, 255 F. 2d 833, 839 (C. A. 3d); *Clark* v. *Commissioner*, 253 F. 2d 745, 751 (C. A. 3d).

[4] Section 294 (d) (2) also provides an alternative method of determining the addition for underestimation, *i. e.*, the amount by which 80 per cent of the final tax exceeds the estimated tax. The addition imposed upon a taxpayer is the lesser of these two alternatives.

[5] An identical provision is included in Section 39.294–1 (b) (3) (i) of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939.

by the fact that it is substantially a quotation from the pertinent Congressional committee reports. The effect of this decision is that the additions for failure to file a declaration and for substantial underestimation are not to be applied concurrently and that there can be no underestimation where there has been no estimate made.

The decisions of the Third, Fifth, and Ninth Circuits, (*supra*, p. 3), on the other hand, support the Commissioner's position that the provisions of the Regulations are entirely valid because they are reasonable, are consistent with the statutory provisions, and are supported by the legislative history.[6] More-

[6] When Sections 58, 59 and 294 (d) were originally added to the 1939 Code by Section 5, Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, the Committee Reports indicate that the additions for failure to file a declaration and for substantial underestimation were considered to apply separately. S. Rep. No. 221, 78th Cong., 1st Sess., p. 42 (1943 Cum. Bull. 1314, 1345), and H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 56 (1943 Cum. Bull. 1351, 1372), state as follows:

"* * * In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision [addition to the tax for substantial underestimation] will be zero. * * *"

Section 29.294-1 (b) (3) of Treasury Regulations 111, *infra*, p. 33, approved September 5, 1944, adopted this language of the Committee Reports practically verbatim. Congress has amended and, in effect, re-enacted the statutory provisions in question several times since 1943. See Section 118 (a), Revenue Act of 1943, c. 63, 58 Stat. 21; Section 13 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231; Section 202 (a), Revenue Act of 1948, c. 168, 62 Stat. 110; Act of January 2, 1951, c. 1195, 64 Stat. 1136; Section 208 (d) (4), Social Security Act Amendments of 1950, c. 809, 64 Stat. 477; Section 221 (g), Revenue Act of 1950, c. 994, 64 Stat. 906; Section 103 (b), Revenue Act of 1951, c. 521,

over, the Tax Court has consistently upheld the Commissioner's position and has sustained the Regulations.[7] Also, some District Courts have upheld the Regulations,[8] although other District Courts have held to the contrary.[9]

2. As the opinion below recognizes (Appendix A, *infra*, p. 15), the issue presented is an important one

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65 Stat. 152. In none of these instances has Congress indicated its disapproval of the above provision of the Regulations.

[7] For example, see *Fuller* v. *Commissioner*, 20 T. C. 308, affirmed on other grounds, 213 F. 2d 102 (C. A. 10th); *Hartley* v. *Commissioner*, 23 T. C. 353, modified, 23 T. C. 564; *Rictor* v. *Commissioner*, 26 T. C. 913; *Maxey* v. *Commissioner*, 26 T. C. 992, 996; *Skarda* v. *Commissioner*, 27 T. C. 137; *Romer* v. *Commissioner*, 28 T. C. 1228, 1255; *Marbut* v. *Commissioner*, 28 T. C. 687, 692; *Dalsanter* v. *Commissioner*, 28 T. C. 845, currently pending in the Sixth Circuit; *Spichel* v. *Commissioner*, 28 T. C. 938; *Garsgal* v. *Commissioner*, 28 T. C. 1086; *Hickerson* v. *Commissioner*, 29 T. C. 864; *Voloudakis* v. *Commissioner*, 29 T. C. 1101, currently pending in the Ninth Circuit; *Shippee* v. *Commissioner*, 30 T. C. No. 69; *Payne* v. *Commissioner*, 30 T. C. No. 111; *Irby* v. *Commissioner*, 30 T. C. No. 123; *Bilsky* v. *Commissioner*, 31 T. C. No. 6; *King* v. *Commissioner*, 31 T. C. No. 15.

[8] These include *Peterson* v. *United States*, 141 F. Supp. 382 (S. D. Tex.); *Farrow* v. *United States*, 150 F. Supp. 581 (S. D. Calif.); *Palmisano* v. *United States*, 159 F. Supp. 98 (E. D. La.), currently pending in the Fifth Circuit; *Echols* v. *Tomlinson* (S. D. Fla.), decided August 5, 1958 (2 A. F. T. R. 2d 5197), currently pending in the Fifth Circuit.

[9] See, for example, *United States* v. *Ridley*, 120 F. Supp. 530 (N. D. Ga.); *Owen* v. *United States*, 134 F. Supp. 31 (Neb.), appeal dismissed, 232 F. 2d 894 (C. A. 8th); *Jones* v. *Wood*, 151 F. Supp. 678 (Ariz.); *Powell* v. *Granquist*, 146 F. Supp. 308 (Ore.), affirmed on other issues, 252 F. 2d 56 (C. A. 9th); *Stenzel* v. *United States*, 150 F. Supp. 364 (N. D. Calif.); *Witt* v. *Tomlinson* (S. D. Fla.), decided March 24, 1958 (58-1 U. S. T. C., par. 9437), currently pending in the Fifth Circuit; *Wood* v. *United States*, 163 F. Supp. 426 (E. D. Tex.); *Barnwell* v. *United States*, 164 F. Supp. 430 (E. D. S. C.).

affecting many taxpayers, notwithstanding changes made by the Internal Revenue Code of 1954.[10] The Internal Revenue Service estimates that at the present time there are pending 3,800 cases involving more than $10,000,000 which raise this issue under the 1939 Code. Some of these cases are currently in litigation.[11] In the circumstances, resolution of this

[10] The 1954 Code eliminates the separate additions for failure to file the declaration or pay the estimated tax and for substantial underestimation of the estimated tax (Section 6651 (e) (26 U. S. C. 1952 ed., Supp. V, Sec. 6651 (e)). The 1954 Code provides for a single addition for underpayment of the estimated tax at the rate of 6 per cent of the amount of the underpayment (Section 6654 (26 U. S. C. 1952 ed., Supp. V, Sec. 6654)). It is noteworthy that, in explaining this change, the Committee Reports pertaining to the 1954 Code point out that under the 1939 Code additions for failure to file a declaration and for substantial underestimation would both apply concurrently, stating as follows (H. Rep. No. 1337, 83d Cong., 2d Sess., p. 40 (3 U. S. C. Cong. & Adm. News (1954) 4017, 4127); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 135 (3 U. S. C. Cong. & Adm. News (1954) 4621, 4769)):

"* * * This charge [for substantial underestimation] and the charge for failure to file a declaration or pay an installment of estimated tax may run concurrently and result in a combined charge of 15 percent of the estimated tax due."

[11] Tax Court decisions which uphold the Commissioner's position and which are currently on appeal include the following: *Neil* v. *Commissioner*, decided May 16, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,088), and *Cassell* v. *Commissioner*, decided April 7, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,054), which are pending in the Fifth Circuit; *Delsanter* v. *Commissioner*, *supra*, *Harp* v. *Commissioner*, decided June 26, 1957 (1957 P-H T. C. Memorandum Decisions, par. 57,105), *Gudgel* v. *Commissioner*, decided May 12, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,083), and *McIntyre* v. *Commissioner*, decided August 13, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,151), which are pending in the Sixth Circuit; and *Voloudakis* v. *Commissioner*, *supra*, and *Olshausen* v. *Commissioner*, decided May 13, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,085), which are pending in the Ninth Circuit.

District Court decisions which upheld the Commissioner's posi-

issue by this Court is important to both the Commissioner and taxpayers so that inequalities, depending on the jurisdiction in which the tax return was filed, may be avoided.

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tion and which are currently pending in the Fifth Circuit include *Palmisano* v. *United States*, *supra*, and *Echols* v. *Tomlinson*, *supra*. *Witt* v. *Tomlinson*, *supra*, which was decided in favor of the taxpayer is also currently pending in the Fifth Circuit.

Other current Tax Court decisions in which the appeal period has not run include the following: *Gladstone* v. *Commissioner*, opinion dated September 15, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,167), and *Colabella* v. *Commissioner*, opinion dated July 15, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,136), the venue of which would lie in the Second Circuit; *Irby* v. *Commissioner*, *supra*; *Carter* v. *Commissioner*, opinion dated August 29, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,166); *McKim* v. *Commissioner*, opinion dated August 13, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,154); *Pippa* v. *Commissioner*, *supra*; and *Shippen* v. *Commissioner*, *supra*, the venue of which would lie in the Fifth Circuit; *Turner* v. *Commissioner*, opinion dated September 30, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,181), the venue of which would lie in the Sixth Circuit; *Ebner* v. *Commissioner*, opinion dated June 9, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,108), the venue of which would lie in the Seventh Circuit; *Bilsky* v. *Commissioner*, *supra*, the venue of which would lie in the Eighth Circuit; and *King* v. *Commissioner*, *supra*, the venue of which would lie in the Ninth Circuit.

Other cases which are currently pending in the District Courts include the following: *Davies* v. *United States* (Mass.); *Macken* v. *Hoffman* (E. D. N. Y.); *National Bank of Westchester, White Plains* v. *United States* (S. D. N. Y.); *Miller* v. *United States* (W. D. N. Y.); *Griffin* v. *Dudley* (W. D. Pa.); *Eagen* v. *United States* (W. D. S. C.); *Lister* v. *United States* (N. D. Ga.); *Jones* v. *United States* (M. D. Ga.); *Peacock* v. *United States* (S. D. Ga.); *Dean* v. *United States* (S. D. Ga.); *Sami* v. *United States* (S. D. Fla.); *Tompkins* v. *Tomlinson* (S. D. Fla.); *Waddell* v. *Tomlinson* (S. D. Fla.); *LeBlanc* v. *United States* (E. D. La.); *Gray* v. *United States* (W. D. Tex.); *Edwards* v. *Looker* (S. D. Ohio); *Reed* v. *United States* (S. D. Ind.); *Carey* v. *United States* (E. D. Ill.); *Toly* v. *United States* (E. D. Wash.); *Nash* v. *Gran-*

CONCLUSION

There is a direct conflict among the circuits, and the question, involving the validity of a Treasury Regulation, is one of substantial importance. In these circumstances, apart from the merits of the decision below, review by this Court appears to be warranted.

Respectfully submitted.

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DECEMBER 1958.

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quist (Ore.); *Calley* v. *United States* (Ariz.); *Benson* v. *United States* (Ariz.); *Russell* v. *United States* (Kansas); *Smith* v. *United States* (Colo.); *Gentry* v. *Vidal* (N. Mex.).

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 13320

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Decided June 18, 1958

Filed June 18, 1958. Carl W. Reuss, Clerk.

Before SIMONS, Chief Judge; MILLER, Circuit Judge, and MATHES, District Judge.

MATHES, District Judge: The Tax Court sustained *in toto* respondent's determinations of deficiencies in petitioner's income tax and additions thereto under Int. Rev. Code of 1939 §§ 291 (a), 294 (d) (1) (A), and 294 (d) (2) for the years 1947-1950 inclusive.

Petitioner does not question here the correctness of the additions to tax under § 291 (a); but challenges the validity of all the deficiency determinations and additions to tax under §§ 294 (d) (1) (A) and 294 (d) (2) for each of the years involved.

The facts, as set out in the Tax Court's Memorandum Findings of Fact and Opinion [16 CCH Tax Ct. Memo. 89 (1957)], are not in controversy. Petitioner is an attorney and a resident of Ohio. During

the relevant period petitioner was a stockholder, in some instances the sole stockholder, in several corporations. All but one of the deficiency determinations in issue upon this review concern activities of petitioner with respect to one or more of those corporations.

Petitioner not only disputes the correctness of the Tax Court's application of the Code sections involved; he also attacks the constitutionality in general of the income tax provisions of the Internal Revenue Code of 1939, and the constitutionality in particular of the requirement that a declaration of estimated tax be filed.

Inasmuch as the constitutional issues need not be reached if, as petitioner contends, the Tax Court incorrectly interpreted and applied the pertinent sections of the Internal Revenue Code of 1939, we turn first to the statutory questions. [See: *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575 (1947); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, 345–348 (1936) (concurring opinion of Mr. Justice Brandeis).]

In 1947, 1948, and 1949, petitioner personally paid real estate taxes on Ohio property owned by a corporation which in turn was wholly owned by him. Petitioner admits that title was kept in the corporation solely for his own convenience, that the property taxes were assessed against the corporation, and that within the period in question the corporation transacted business by selling some of the property. The Tax Court was clearly correct in sustaining respondent's determination that under the circumstances the property taxes were not deductible by petitioner. [Int. Rev. Code of 1939, § 23 (c) (1); Treasury Regulation 111 § 29.23 (c)–1, 26 C. F. R. (1949); *Moline Properties, Inc.* v. *Commissioner*, 319 U. S.

436 (1943); *Magruder* v. *Supplee*, 316 U. S. 394 (1942); *Gilken Corp.* v. *Commissioner*, 176 F. (2d) 141 (6th Cir. 1949); *Bradno* v. *Commissioner*, 138 F. (2d) 779 (6th Cir. 1943); and see *Simon J. Murphy Co.* v. *Commissioner*, 231 F. (2d) 639 (6th Cir. 1956).]

In 1950 petitioner was convicted and imprisoned for willful failure to file an income tax return for 1946. In his unsuccessful defense of this criminal prosecution petitioner expended $2,290 for legal expenses and bond costs which he urges are deductible, apparently under Int. Rev. Code of 1939, § 23 (a), on the theory that defending against criminal charges is "an absolute necessity" for an attorney and that his fight in the criminal case greatly enhanced his reputation. The Tax Court properly sustained respondent's disallowance of this deduction. "A taxpayer who has been prosecuted under a federal or state statute and convicted of a crime has not been permitted a tax deduction for his attorney's fee." [*Commissioner* v. *Heininger*, 320 U. S. 467, 473 n. 8 (1943); *Estate of Albert E. MacCrone*, 14 CCH Tax Ct. Memo. 958 (1955), *aff'd, on this point and rev'd, on other grounds*, 240 F. (2d) 841 (4th Cir. 1956); see: *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30 (1958); *Hoover Motor Express Co.* v. *United States*, 356 U. S. 38 (1958).]

In 1947 petitioner loaned $8,500 to a corporation in which he owned stock, and the loan became worthless during that year. In 1948 petitioner was required to pay a note which he had guaranteed for another corporation in which he owned stock, resulting in a $3,465.49 loss to him. Respondent determined that both of these losses were deductible only as non-business bad debts, required to be treated as short term capital losses [Int. Rev. Code of 1939, § 23 (k) (4)], and so subject to the amount limitation specified in

§ 117 (d) (2) of the Internal Revenue Code of 1939. The Tax Court found that petitioner failed to show that he was in the business of lending money to or guaranteeing the loans of corporations, and so sustained respondent's determinations. We agree. [Treasury Regulation 111 § 29.23 (k)–6, 26 C. F. R. (1949); *Putnam* v. *Commissioner*, 352 U. S. 82, 92–93 (1956); *Wheeler* v. *Commissioner*, 241 F. (2d) 883 (2d Cir. 1957); *Commissioner* v. *Schaefer*, 240 F. (2d) 381 (2d Cir. 1957); and see *McNeill* v. *Commissioner*, 251 F. (2d) 863, 866–867 (4th Cir. 1958).]

For the years 1947 through 1950 respondent imposed on petitioner and the Tax Court sustained additions to tax both under § 294 (d) (1) (A) for failure to file a declaration of estimated tax, and under § 294 (d) (2) for substantial underestimation of estimated tax. Petitioner does not rely on the statutory excuse of "reasonable cause and not * * * willful neglect" to justify his failure to file the declarations. Rather, he maintains that the statutory provisions requiring the filing of a declaration of estimated tax are unconstitutional because "the enumerated powers of the Congress do not include any power to compel a citizen to prophesy. It is beyond any human ability and therefore not a subject for Congressional intervention."

Since petitioner makes no attempt to establish the statutory excuse, the Tax Court correctly applied the statute in sustaining imposition of the additions to tax under § 294 (d) (1) (A) for failure to file the declarations of estimated tax. And we hold with the Tax Court that petitioner's attack upon the constitutionality of the provisions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax, and imposing penalties for failure to file, is "wholly without merit." Such requirements are a **valid** exercise of the taxing power conferred

by Article 1, § 8, and the Sixteenth Amendment of the Constitution. [*Erwin* v. *Granquist*, 253 F. (2d) 26 (9th Cir. 1958); *Walker* v. *United States*, 240 F. (2d) 601 (5th Cir.), *cert. denied*, 354 U. S. 939 (1957).]

Petitioner next contends that imposition of concurrent penalties under §§ 294 (d) (1) (A) and 294 (d) (2) of the 1939 Code is without statutory warrant. The Tax Court held that petitioner's failure to file any estimate at all amounted to a zero estimate which, in turn, resulted in a substantial underestimate within the purview of § 294 (d) (2). This holding is in accord with Treasury Regulation 111 § 29.294–1 (b) (3) (i) [26 C. F. R. (1949)], and is supported by a long line of Tax Court decisions [see, among others: *Clarence F. Buckley*, 29 T. C. No. 50 (1957); *Marcel Garsaud*, 28 T. C. 1086, 1090 (1957); *Harold C. Marbut*, 28 T. C. 687, 692 (1957); *J. D. Abbott*, 28 T. C. 795, 808–809 (1957); *Anthony Delsanter*, 28 T. C. 845, 861–862 (1957); *Walter H. Kaltreider*, 28 T. C. 121, 126 (1957); *Marvin Maxey*, 26 T. C. 992, 996 (1956); *Harry Hartley*, 23 T. C. 353, 360, *modified*, 23 T. C. 564 (1954); *G. E. Fuller*, 20 T. C. 308, 316 (1953), *aff'd., on other grounds*, 213 F. (2d) 102 (10th Cir. 1954)], and by some District Court decisions [*Palmisano* v. *United States*, 159 F. Supp. 98 (E. D. La. 1958); *Farrow* v. *United States*, 150 F. Supp. 581 (S. D. Cal. 1957); *Peterson* v. *United States*, 141 F. Supp. 382 (S. D. Tex. 1956)].

While this court has affirmed three Tax Court decisions which have sanctioned imposition of penalties under both § 294 (d) (1) (A) and § 294 (d) (2) where no declaration of estimated tax had been filed, examination of the briefs and appendices in these cases discloses that the propriety of imposing the penalty for substantial underestimation where no estimate at all

had been filed was not raised in this court. [*John Fedrika*, 14 CCH Tax Ct. Memo. 652, 658 (1955) *aff'd., per curiam*, 237 F. (2d) 916 (6th Cir. 1956), cert. denied, 352 U. S. 1025 (1957); *Robert Fogel*, 14 CCH Tax Ct. Memo. 718, 728 (1955), *aff'd., per curiam*, 237 F. (2d) 918 (6th Cir. 1956); *R. M. Clayton*, 15 CCH Tax Ct. Memo. 105, 109 (1956), *aff'd., per curiam*, 245 F. (2d) 238 (6th Cir. 1957).] The question remains open for examination then as *res integra* here.

Even though this problem of concurrent penalties exists only under the 1939 Code, and cannot arise under the 1954 Code which expressly provides but a single penalty for underpayment of estimated tax [Int. Rev. Code of 1954, §§ 6651 (*c*), 6654, and see 3 U. S. Code Cong. & Ad. News (1954) 4544, 4567, 5241–5242], the problem remains an important one because of cases yet to be decided which will be ruled by the 1939 Code [see Int. Rev. Code of 1954, § 6654 (h)].

The argument in support of the validity of that part of Treasury Regulation 111 § 29.294–1 (b) (3) (i) [26 C. F. R. (1949)] declaring that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero," has been well stated in *Palmisano* v. *United States*, *supra*, 159 F. Supp. 98 and *Farrow* v. *United States*, *supra*, 150 F. Supp. 581. [See also *G. E. Fuller*, *supra*, 20 T. C. at 316.]

But to give effect to the quoted regulation presents a problem even greater than the logical difficulty encountered in saying that one who has filed no estimate at all has thereby underestimated his tax. [See *Barnwell* v. *United States*, 58–1 U. S. T. C. Par. 9374 (E. D. S. C. Feb. 4, 1958).] For although the Congress treated failure to file a declaration of estimated tax and substantial underestimation of tax as separate and distinct acts under the 1939 Code, and provided sepa-

rate and different penalties for each, the regulation renders a taxpayer who has failed to file a declaration ipso facto subject to both the penalty for failure to file and the penalty for substantial underestimation. As the Tax Court itself observed in rebuffing another attempt of respondent to extend these penalties by implication: "If the legislature had intended such a result it would have had been a simple matter so to provide." [*Anthony Delsanter, supra*, 28 T. C. at 862.]

Moreover, inasmuch as the regulation imposes a penalty in addition to one expressly imposed by the statute itself for the same omission, we are unable to perceive wherein the regulation is necessary to effectuate the statutory taxing scheme. Section 294 (d) of the Internal Revenue Code of 1939 is penal in nature and to be strictly construed. [*Stephan* v. *Commissioner*, 197 F. (2d) 712 (5th Cir. 1952); *Barnwell* v. *United States*, *supra*, 58–1 U. S. T. C. Par. 9374; *Davis* v. *Dudley*, 124 F. Supp. 426, 429 (W. D. Pa. 1954); see *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284, 296 (1954).] "Penalties are never extended by implication" [*Elliott* v. *Railroad Co.*, 99 U. S. 573, 576 (1878); *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472 (2d Cir. 1930)], and "all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfried, Inc.* v. *Commissioner*, 162 F. (2d) 628, 633 (3rd Cir. 1947).]

Furthermore, even if the exactions involved be treated as "additions to Tax," as they are denominated by § 294 of the 1939 Code, the regulation runs counter to the long established rule that "statutes levying taxes . . . are not to be extended by implication beyond the clear import of the language used." [*United States* v. *Merriam*, 263 U. S. 179, 187–188 (1923); *Crooks* v. *Harrelson*, 282 U. S. 55, 61 (1930); *Reinecke* v. *Gardner*, 277 U. S. 239, 244 (1928); *Gould* v. *Gould*,

245 U. S. 151, 153 (1917); *cf. Parker Pen Co. v. O'Day*, 234 F. (2d) 607, 609 (7th Cir. 1956).]

Mindful of the cogent reasoning of the Tax Court and District Court opinions sustaining the regulation, we nevertheless are of opinion that Treasury Regulation 111 § 29.294–1 (b) (3) (i) [26 C. F. R. (1949)] is invalid insofar as it provides that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero." In so holding we are mindful too that, as the Tax Court and the District Courts have pointed out, Treasury regulations are presumptively valid. But we think that in this instance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, "unreasonable and plainly inconsistent with the revenue [statute]," and so cannot be sustained. [*Commissioner v. South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).]

This conclusion is buttressed by the fact that it is in accord with that reached by the majority of the District Courts which have considered the problem. [*Barnwell v. United States, supra*, 58–1 U. S. T. C. Par. 9374; *Erwin v. Granquist*, 57–2 U. S. T. C. Par. 9732 (D. Ore. 1957), *aff'd.*, 253 F. (2d) 26 (9th Cir. 1958); *Powell v. Granquist*, 146 F. Supp. 308, 312 (D. Ore. 1956), *aff'd.*, 252 F. (2d) 56 (9th Cir. 1958); *Jones v. Wood*, 151 F. Supp. 678 (D. Ariz. 1956); *Stenzel v. United States*, 150 F. Supp. 364 (N. D. Cal. 1957); *Hodgkinson v. United States*, 57–1 U. S. T. C. Par. 9294 (S. D. Cal. 1956); *Owen v. United States*, 134 F. Supp. 31, 39 (D. Neb. 1955), *modified on another point sub nom. Knop v. United States*, 234 F. (2d) 760 (8th Cir. 1956); *Todd v. United States*, 57–2

U. S. T. C. Par. 9768 (N. D. Ga. 1957); *Glass* v. *Dunn*, 56-2 U. S. T. C. Par. 9840 (N. D. Ga. 1956); *United States* v. *Ridley*, 127 F. Supp. 3, 11 (N. D. Ga. 1954); *United States* v. *Ridley*, 120 F. Supp. 530, 538 (N. D. Ga. 1954).]

The judgment of the Tax Court must therefore be reversed as to the additions to tax under § 292 (d)(2). However, our conclusion that the claimed deductions were properly disallowed compels us nonetheless to reach the constitutional issues raised as to the income tax provisions of the Internal Revenue Code of 1939.

Petitioner asserts that these income tax provisions are unconstitutional because: (1) the rates are so high as to make the levy not a tax but a confiscation of property contrary to the Fifth Amendment to the Constitution, (2) the progressive rates are unconstitutional, and (3) the "income tax law considered as a whole in its excessive rates and arbitrary provisions is openly subversive of the fundamental philosophy of the Constitution of the United States and repugnant to its continued existence."

The Tax Court summarily disposed of these constitutional issues with the statement: "It has long been recognized that where a taxing statute is within the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does does not invalidate the taxing act." [16 CCH Tax Ct. Memo. at 91.]

This declaration by the Tax Court completely overlooks petitioner's arguments by assuming the very thing that he disputes, namely, whether the Congress has the power to enact an income tax law like that found in the Internal Revenue Code of 1939.

While holding that the courts may not disturb the judgment of the Congress because of indirect effects

of a statute that clearly represents an exercise of the taxing power [see, for example, *McCray* v. *United States*, 195 U. S. 27 (1904)], on more than one occasion the Supreme Court has adverted to the possibility that a law, although denominated a taxing statute, might not be a taxing statute at all, but one which on its face has crossed the boundary from the classification "tax" to the classification "taking," so as to become subject to the limitations of the Fifth Amendment to the Constitution. [*Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585 (1937); *Brushaber* v. *Union Pacific* R. R., 240 U. S. 1, 24 (1916).]

We know of no authority holding that the Congress may constitutionally enact a law which, although called a tax statute, on its face amounts to a taking of private property without compensation therefor. That such a law would fall within the area of "taking," rather than the area of "taxing," and so be subject to judicial nullification because of the limitations of the Fifth Amendment was clearly recognized by Mr. Chief Justice White speaking for the Court in *Brushaber* v. *Union Pacific R. R.*, *supra*, 240 U. S. 1, where he pointed out that, despite the breadth of the taxing power conferred by the Constitution, there might arise "a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." [240 U. S. at 24-25.]

This principle was also recognized by Mr. Justice Cardozo speaking for the Court in *Steward Machine*

Co. v. *Davis*, *supra*, 301 U. S. 548, when he wrote: "[W]e assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." [301 U. S. at 585.] Nor do we forget the ringing words of Mr. Justice Holmes when, in dissent, he declared: "The power to tax is not the power to destroy while this Court sits." [*Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928).]

Since the Tax Court applied an incorrect legal standard in judging petitioner's claim of unconstitutionality, it would be proper to remand the case to enable that court to weigh the evidence in light of correct legal standards. However, on surveying the entire record from which it appears that petitioner fully presented to the Tax Court both his constitutional arguments and his evidence supporting them, we think there is no reasonable basis in fact or law for a holding that the income tax provisions of the Internal Revenue Code of 1939 are unconstitutional either on their face or as applied to petitioner in this case.

The 1939 Code is unquestionably a taxing statute in substance as well as in name. The constitutionality of progressive tax rates is long settled. [*Knowlton* v. *Moore*, 178 U. S. 41 (1900); *Brushaber* v. *Union Pacific R. R.*, *supra*, 240 U. S. 1.] The classifications drawn in question here do not appear to be either arbitrary or unreasonable in any constitutional sense. To the contrary, in large part they represent "the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." [*Burnet* v. *Wells*, 289 U. S. 670, 676 (1933).]

Nor can we say that the rates of tax, admittedly high, have reached confiscation or a "taking" in the constitutional sense. All in all, much as we may as men sympathize with petitioner's arguments about our tax plight, as judges we must say that he has addressed them to the wrong forum: they are for the Congress, and not for the courts.

For the reasons stated, the judgment of the Tax Court is reversed insofar as it sustains the additions to tax under § 292 (d) (2) of the Internal Revenue Code of 1939. In all other respects, the judgment is affirmed.

Judgment

Filed June 18, 1958

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed insofar as it sustains the additions to tax under § 294 (d) (2) of the Internal Revenue Code of 1939. In all other respects, the judgment is affirmed.

United States Court of Appeals for the Sixth Circuit

No. 13,320

FRED N. ACKER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER ON PETITIONS FOR REHEARING

Filed September 3, 1958

Filed September 3, 1958. Carl W. Reuss, Clerk.

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Before: SIMONS, Chief Judge, MILLER, Circuit Judge, and MATHES, District Judge.

PER CURIAM.

Each party has petitioned for a rehearing. Petitioner but restates a portion of his earlier argument.

Respondent, however, now advances the contention that "the Treasury Regulation in question could hardly be inconsistent with the statute * * * because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute." [Compare Treasury Regulation 111 § 29.294–1 (b) (3) (i), 26 C. F. R. (1949) with S. Rep. No. 221, 78th Cong., 1st Sess. 12 (1943 Cum. Bull. 1314, 1325), and H. R. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943 Cum. Bull. 1351, 1372).]

Respondent also calls to our attention the recent decisions of *Patchen* v. *Commissioner*, * * * F. 2d * * * (5th Cir., July 23, 1958), *Abbott* v. *Commissioner*, * * * F. 2d * * * (3rd Cir., July 31, 1958), and *Hanson* v. *Commissioner*, * * * F. 2d * * * (9th Cir., Aug. 4, 1958). These decisions, rendered subsequent to the publication of our opinion in this case, express disagreement with our holding that the penalty for failure to file a declaration of estimated tax [Int. Rev. Code of 1939 § 294 (d) (1) (A)] and the penalty for substantial underestimation of estimated tax [*id.* § 294 (d) (2)] cannot be imposed concurrently so as to work the exaction of a double penalty.

In the *Patchen* case the learned Court of Appeals for the Fifth Circuit appears to credit as authority decisions of this Court in which the problem was never raised. [See footnote 15 citing *Fogel* v. *Commissioner*, 237 F. 2d 918 (6th Cir. 1956) and *Clayton* v. *Commissioner*, 245 F. 2d 238 (6th Cir. 1957). See also 3 Roehmer, Federal Taxation Par. 153 at page 191 (Aug. 8, 1958).]

In the *Abbott* case the learned Court of Appeals for the Third Circuit recognizes that: "An examination of the underestimation provisions of Section 294 (d) (2), taken alone, leaves unanswered the question of whether the penalty provided should be imposed where no declaration of estimated tax is filed." [*Abbott* v. *Commissioner*, *supra*, * * * F. 2d at * * *] The Court then observed that "[t]he statute being ambiguous, resort to legislative history is proper in an endeavor to ascertain Congressional intent" [*ibid.*]; and concluded from the legislative history that the Congress intended the double penalty since "the regulation is precisely in accord with the Congressional intent expressed in the conference report." [*Ibid.*]

In the *Hausen* case the learned Court of Appeals for the Ninth Circuit likewise concluded from the legislative history that "[n]o other conclusion is possible but that Congress intended" to provide in the Act for the double penalty. [*Hausen* v. *Commissioner*, *supra*, * * * F. 2d at * * *]

However, it has long been our view that "[such an] intention of the Congress must be gathered from the language of the Act. * * *" [*United States* v. *Stroop*, 109 F. 2d 891, 893 (6th Cir. 1940); see also *Hopkins* v. *Commissioner*, 144 F. 2d 683, 692 (6th Cir. 1944).]

"Further", as the Court of Appeals for the Third Circuit has pointed out on another occasion, "it is well-settled that in the application of penalties, 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.'" [*Hatfried, Inc.* v. *Commissioner*, 162 F. 2d 628, 633 (3rd Cir. 1947).]

While our great respect for the learning and acumen of the Courts of Appeals for the Third, Fifth, and Ninth Circuits naturally gives us pause, we are nonetheless of opinion that the challenged regulation authorizing imposition of double penalties cannot be validated by the fact that it is substantially a quotation from the Congressional committee reports.

It seems to us a policy of first order that taxpayers under this "government of laws and not of men" be entitled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval. [U. S. Const. Art I, §§ 7, 8, clause 1; Amend. XVI; see: *Langstaff* v. *Lucas*, 9 F. 2d 691, 692–693 (W. D. Ky. 1925), *aff'd upon the opinion of the District Court*, 13 F. 2d 1022 (6th

Cir.), *cert. denied*, 273 U. S. 721 (1926); *Masonite Corp.* v. *Fly*, 194 F. 2d 257, 260 (5th Cir. 1952); *Helvering* v. *Robsamen Motors, Inc.*, 128 F. 2d 584, 587-588 (8th Cir. 1942).]

Especially is this so where, as in the case at bar, the penalty sought to be imposed by administrative regulation is cumulative with and in addition to another penalty clearly and expressly imposed by the statute for the identical omission. Such a regulation is an attempted expansion and extension of the statute tantamount to an amendment thereof, and neither "presumptions of validity" nor "reenactment doctrines" can serve to validate it. [*United States* v. *Calamaro*, 354 U. S. 351, 358-359 (1957); *Koshland* v. *Helvering*, 298 U. S. 441, 446-447 (1936); *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U. S. 129, 134-135 (1936); *Lincoln Elec. Co. Employees' Profit Sharing Trust* v. *Commissioner*, 190 F. 2d 326, 330 (6th Cir. 1951); *Langstaff* v. *Lucas*, *supra*, 9 F. 2d at 692-693; see *United States* v. *Abrams*, 197 F. 2d 803, 805 (6th Cir.), cert. denied, 344 U. S. 855 (1952).]

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law:" [*Morrill* v. *Jones*, 106 U. S. 466, 467 (1882).]

Each of the petitions for rehearing is denied.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 58 [as amended by the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Sec. 5 (a); Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sec. 13 (a); and Revenue Act of 1948, c. 168, 62 Stat. 110, Sec. 202 (a)].

DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621 (a), withholding under Subchapter D of Chapter 9 is not made applicable) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500[1] plus $600 with respect to each exemption provided in section 25 (b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.

(b) *Contents of Declaration.*—In the declaration required under subsection (a) the individual shall state—

(1) the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under sections 32 and 35 for taxes withheld at source;

(2) the amount which he estimates as the

[1] Prior to the amendment by Section 202 (a) of the Revenue Act of 1948, *supra*, this amount was $5,000.

credits for the taxable year under sections 32 and 35; and

(3) the excess of the amount estimated under paragraph (1) over the amount estimated under paragraph (2), which excess for the purposes of this chapter shall be considered the estimated tax for the taxable year.

The declaration shall also contain such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury.

* * * * *

(26 U. S. C. 1952 ed., Sec. 58.)

SEC. 59 [as added by the Current Tax Payment Act of 1943, *supra*, Sec. 5 (a), and amended by Individual Income Tax Act of 1944, *supra*, Sec. 13 (a)]. PAYMENT OF ESTIMATED TAX.

(a) *In General.*—The estimated tax shall be paid as follows:

(1) If the declaration is filed on or before March 15 of the taxable year, the estimated tax shall be paid in four equal installments. The first installment shall be paid at the time of the filing of the declaration, the second and third on June 15 and September 15, respectively, of the taxable year, and the fourth on January 15 of the succeeding taxable year.

(2) If the declaration is filed after March 15 and not after June 15 of the taxable year, and is not required by section 58 (d) to be filed on or before March 15 of the taxable year, the estimated tax shall be paid in three equal installments. The first installment shall be paid at the time of the filing of the declaration, the second on September 15 of the taxable year, and the third on January 15 of the succeeding taxable year.

(3) If the declaration is filed after June 15 and not after September 15 of the taxable year, and is not required by section 58 (d) to be filed on or before June 15 of the taxable year, the estimated tax shall be paid in two equal installments. The first installment shall be paid at the time of the filing of the declaration, and the second on January 15 of the succeeding taxable year.

(4) If the declaration is filed after September 15 of the taxable year, and is not required by section 58 (d) to be filed on or before September 15 of the taxable year, the estimated tax shall be paid in full at the time of the filing of the declaration.

(5) If the declaration is filed after the time prescribed in section 58 (d) (including cases in which an extension of time for filing the declaration has been granted under section 58 (e)), paragraphs (2), (3), and (4) of this subsection shall not apply, and there shall be paid at the time of such filing all installments of estimated tax which would have been payable on or before such time if the declaration had been filed within the time prescribed in section 58 (d), and the remaining installments shall be paid at the times at which, and in the amounts in which, they would have been payable if the declaration had been so filed.

(*b*) *Amendments of Declaration.*—If any amendment of a declaration is filed, the remaining installments, if any, shall be ratably increased or decreased, as the case may be, to reflect the increase or decrease, as the case may be, in the estimated tax by reason of such amendment, and if any amendment is made after September 15 of the taxable year, any increase in the estimated tax by reason thereof shall be paid at the time of making such amendment.

(*c*) *Installments Paid in Advance.*—At the election of the individual, any installment of

the estimated tax may be paid prior to the date prescribed for its payment.

(d) *Payment as Part of Tax for Taxable Year.*—Payment of the estimated tax, or any installment thereof, shall be considered payment on account of the tax for the taxable year. Assessment in respect of the estimated tax shall be limited to the amount paid.

(26 U. S. C. 1952 ed., Sec. 59.)

SEC. 294 [As amended by Section 118 (a), Revenue Act of 1943, c. 63, 58 Stat. 21, Sections 6 (b) (8), and 13 (b) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. ADDITIONS TO THE TAX IN CASE OF NON-PAYMENT.

* * * * *

(d) *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credit under sections 32 and 35.

(B) *Failure To Pay Installments of Estimated Tax Declared.*—Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount to such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60 (a), or 66⅔ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely pay-

ment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60 (a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 294.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.294–1 [As added by T. D. 5305, 1943 Cum. Bull. 260, and amended by T. D. 5403, 1944 Cum. Bull. 349, and T. D. 5420, 1944 Cum. Bull. 355] Additions to the tax.—(a) *General.*—

Section 294 (d) provides for certain additions to the tax in the case of—

(1) failure to file timely a declaration of estimated tax;

(2) failure to pay within the time prescribed any installment of declared estimated tax; and

(3) substantial underestimate of the estimated tax.

These additions to the tax are in addition to any applicable criminal penalties.

(b) *Additions for specific failures on the part of the taxpayer with respect to the estimated tax.*—(1) *Failure to file declaration.*—

Section 294 (d) (1) (A) provides for an addition to the tax in the case of a failure to make

and file a declaration of estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax shall be in an amount equal to 5 per cent of the unpaid amount of each installment and in addition 1 per cent of the unpaid amount of the installment for each month (except the first) or fraction thereof during which such amount remains unpaid. Such addition to the tax with respect to any installment due but unpaid shall not exceed 10 per cent of the unpaid portion of such installment. For the purposes of section 294 (d) (1) (A) the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits for tax withheld at source.

* * * * * *

(2) Failure to pay installment of declared estimated tax.—Section 294 (d) (1) (B) provides for an addition to the tax in the case of the failure to pay an installment of the declared estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax is applicable to delinquency in payment only (1) where a timely declaration of estimated tax has been made and filed or (2) where the Commissioner has found that the failure to make and file a timely declaration was due to reasonable cause and not to willful neglect. Such addition to the Tax shall be in an amount equal to 5 per cent of the unpaid amount of each installment of declared estimated tax and in addition 1 per cent of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. The addition to the tax is limited with

respect to any installment due but unpaid to 10 per cent of the unpaid portion of such installment. Such addition to the tax is not applicable in cases to which the addition to the tax under section 294 (d) (1) (A) applies.

* * * * *

(3) *Substantial understatement of estimated tax.*—Section 294 (d) (2) provides for an addition to the tax in the case of a taxpayer who makes a substantial underestimate of tax on his declaration. Such addition to the tax shall not apply to the taxable year in which falls the death of the taxpayer.

For the taxable years beginning after December 31, 1942, except as hereinafter provided—

(A) In the case of individuals, other than those exercising the election under section 60 (a), relating to farmers, an addition to the tax under section 294 (d) (2) is applicable in the event that the amount of the estimated tax (increased by the amount of the credit for taxes withheld at source on wages and the credit under section 32) is less than 80 per cent of the tax imposed by Chapter 1 for the taxable year (determined without regard to such credits). In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1954

MOTION FILED MAR 9 1959

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 13

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

FRED N. ACKER,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE and BRIEF OF GEORGE OLSHAUSEN AS AMICUS CURIAE.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Amicus Curiae.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 553

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

FRED N. ACKER,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

George Olshausen hereby asks leave to file a brief as Amicus Curiae in support of the respondent's position in the above case.

The proposed brief Amicus Curiae is submitted herewith. In advance of filing the brief, I asked for consents from the parties under Rule 42.2 at the same time outlining the contents of the proposed brief. On February 11, 1959, the Solicitor General declined consent; the respondent never answered.

I now have the identical question pending before the Court of Appeals of the Ninth Circuit in *Olshausen v. C.I.R.*, No. 16183.

While I have not seen the briefs in the above case, I have read the opinions in *Acker v. C.I.R.*, 258 F. 2d 568; *Patchen v. C.I.R.*, 258 F. 2d 544; *Hansen v. C.I.R.*, 258 F. 2d 585.

In none of these opinions is either of the following questions considered (which raises the inference that neither of these points has been briefed):

1. The presence of special definitions of other terms used in the 1939 act (secs. 11, 12, 15, 22) coupled with the absence of any special definitions of the terms used in sec. 294, as precluding any construction except the ordinary meaning of the terms used in sec. 294.

2. The authorities holding that where a statute has a well-defined meaning within its four corners, resort cannot be had to congressional committee reports to contradict that meaning—and the effect of this rule upon the construction of sec. 294(d).

The brief *amicus curiae* deals with each of these questions.

For which reasons it is respectfully submitted that the leave to file the accompanying brief *amicus curiae* be granted.

Dated, San Francisco, California,
March 2, 1959.

Respectfully submitted,
GEORGE OLSHAUSEN,
Amicus Curiae.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 553

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

FRED N. ACKER,
Respondent.

BRIEF OF GEORGE OLSHAUSEN AS AMICUS CURIAE.

1. General Principles of Construction.

a. On its face, Sec. 294 uses the phrases "failure to file" and "substantial underestimation" separately and with separate meanings. Since they are used separately in different subsections, they are assumed to be used in different senses. A statute is to be construed to give meaning to every one of its terms.

(*U.S. v. Menasche*, 348 U.S. 528, 538; *Platt v. Union P.R. Co.*, 99 U.S. 48, 58-9.)

This view is reinforced by Secs. 11, 12, 15, 22 of the 1939 act, which give lists of special definitions. The ordinary meaning of "substantial underestimation" is an affirmative act, not a mere passive omission. Cf. definitions of "estimate": *Lougee v. N. Mex. B.&R.*, 41 N. Mex. 115, 76 P. 2d 6, 17; *State ex rel. v. Beach*, 325 Mo. 175, 28 S.W. 2d 105; *Miller, Franklin & Co. v. Gentry*, 230 Mo. App. 892, 79 S.W. 2d 470, 474; *Peo. v. Clark*, 37 Hun. (44 N.Y. Sup. Ct.) 201, 203; *Galloway v. Week*, 54 Wis. 604, 12 N.W. 10, 11; 31 C.J.S. 183. But statutes can and sometimes do incorporate special definitions of terms which they use. *But no section contains any special definition* of the phrase "substantial underestimation". This corroborates the *prima facie* interpretation: "failure to file" and "substantial underestimation" have distinct meanings in Sec. 294 and do not overlap.

b. *Fuller v. C.I.R.*, 20 T.C. 308, quotes a Congressional conference report to the effect that where no estimated tax return is filed, the estimate will be taken to have been zero for purposes of Sec. 294(d)(2). (There is also a treasury regulation to the same effect, but, of course, the regulation cannot supply anything which is not in the statute. *U.S. v. Calamaro*, 354 U.S. 351, 358-9, 1 L. Ed. (2d) 1394, 1399-1400.)

The trouble with this item from the conference report is that it goes contrary to the ordinary meaning of the language of the statute in its final form. Where a statute has a well-defined meaning within

its four corners, resort cannot be had to legislative committee reports to *contradict* that meaning.

Bate Refrigerating Co. v. Sulzberger, 157 U.S. 41-46.

Helvering v. City Bank F.T. Co., 296 U.S. 85, 89:

"We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

McKenzie v. Hare, 239 U.S. 299, 308:

"Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language; or rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been give more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others."

U.S. v. Shreveport Grain & C. Co., 287 U.S. 77, 83:

"In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. *They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms.*" (Emphasis added.)

U.S. v. Mo. Pac. Ry., 278 U.S. 269, 278:

"When doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and

other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative interest. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended *and in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.*" (Emphasis added.)

Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356:

"Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain, and their meaning is apparent, without the necessity of resorting to the extraneous and often unsatisfactory aid of such reports."

Penn. Ry. v. Int. Coal Mine Co., 230 U.S. 184, 199:

"But while they may be looked at to explain doubtful expressions, not even formal reports . . . can be resorted to for the purpose of construing a statute contrary to its plain meaning, or to make identical that which is radically different."

Caminetti v. U.S., 242 U.S. 470.

From these authorities it is clear (1) that the Conference committee report cannot be used to "construe" section 294 of the 1939 act, since (2) the section both on its face and in conjunction with sections 11, 12, 15, 22, shows that "failure to file" and "sub-

stantial underestimation" are two different things, and the act does not impose the penalties for both on one alone. Here, where non-filing is claimed, it was error for the Tax Court also to impose a penalty for supposed "substantial underestimation."

2. Decided cases.

None of the decided cases considers either the effect of the list of special definitions contained in Sees. 11, 12, 15, 22, nor the principle that outside aids to construction are impermissible except in case of ambiguity. Even with these limitations, the Sixth Circuit held the provisions not cumulative. (*Acker v. C.I.R.*, 258 F. 2d 568.).

Hansen v. C.I.R., 258 F. 2d 585, was a decision of the Ninth Circuit, before Judges Pope, Barnes, Hamley. The opinion is written by Judge Barnes. With all due respect to the learned panel, this opinion bases its holdings upon wholly unsound considerations.

The *first* is the same conference report used in the *Fuller* case, *supra*. We have already shown that the statute has a definitely-ascertainable meaning within its four corners, in which event no resort may be had to conference reports to change that meaning.

Secondly, the panel points to the circumstance that the 1954 Internal Revenue Act explicitly makes the two sections *non* cumulative. This is thought to show that the 1939 act must have been cumulative.

But that indicates a failure to think the problem through.

The 1954 act cannot give the 1939 act any different meaning from what the 1939 act had when it was passed. The later act is at best an extrinsic aid to construction. It may be used under the same circumstances and to the same extent as any other extrinsic aid to construction. That is to say, it may be used, if at all, to clear up an ambiguity where the meaning of the statute cannot be determined from its four corners. But, as we have already seen, Sec. 294(d) taken together with Secs. 11, 12, 15, 22, has a definitely ascertainable meaning within its four corners. (As also already noted, these sections are overlooked by all the opinions.) Since Sec. 294(d) has a definitely ascertainable meaning, extrinsic aids to construction are inadmissible. This includes the subsequent statute. (The 1954 amendment showed merely that Congress disapproved the Commissioner's administration of the 1939 Act.)

Patchen v. C.I.R., 258 F. 2d 544 (C.A. 5), likewise makes an incomplete analysis. Pointing out that willful underestimation is penalized regardless of excuse, while non-filing is excused by reasonable cause, it says:

> (p. 552) "This imports that this is expected to be an additional sanction for those who without justification, fail to file a declaration or pay."

This wholly overlooks the aspect that under this construction, Sec. 294(d) may be held to impose an independent penalty *even where the non-filing is found to be excused by reasonable cause*. Conversely, it means that Sec. 294(d)(1)(A) *could never stand*

alone—which runs counter to the framework of the section, which makes 294(d)(1)(A) a subdivision of 294(d)(1) and not a subdivision of 294(d)(2).

The *Patchen* opinion also says:

> (p. 552) "And more important, it might have recognized that those whose willful non-excusable acts prevented the effective operation of the scheme of self-assessment and current payment, ought to bear some additional disadvantage over the person whose arithmetic or prognostication was merely faulty."

This we submit misconstrues 294(d)(2) and again incompletely considers 294(d)(1)(A).

The above passage misconstrues 294(d)(2) because the ordinary meaning of "underestimation" is not an arithmetical error. Again, under the ordinary meaning of the terms, the requirement that the underestimation be "substantial", eliminates the cases where the prognostication is "merely" faulty.

The above passage incompletely considers 294(d)(1)(A) because it does not even discuss the situation where non-filing is held *excusable*, but where (under the Commissioner's contention) a penalty would nonetheless be exacted under 294(d)(2) which does not mention non-filing at all.

3. **Summary.**

The ordinary meaning of the language of Secs. 294(d)(1)(A) and 294(d)(2) coupled with the special definitions given in Secs. 11, 12, 15, 22, shows that sections 294(d)(1)(A) and 294(d)(2) are meant to

apply to distinct situations, and are not intended to overlap. Since they do not overlap, they cannot be applied cumulatively to the same act or omission.

Dated, San Francisco, California,
March 2, 1959.

Respectfully submitted,
GEORGE OLSHAUSEN,
Amicus Curiae.

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No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1959

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRED N. ACKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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Solicitor General,
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In the Supreme Court of the United States

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FRED N. ACKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 6–10) are not officially reported. The opinion of the Court of Appeals (R. 14–22) is reported as 258 F. 2d 568. Its opinion on rehearing (R. 29–31) appears at 258 F. 2d 575.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958. (R. 13.) Petitions for rehearing were denied on September 3, 1958. (R. 29–31.) The petition for a writ of certiorari was filed on December 2, 1958, and was granted on January 19, 1959. (358 U.S. 940; R. 32.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Internal Revenue Code of 1939, a taxpayer who has failed, without excuse, to file a declaration of estimated income tax is subject to the addition for substantial underestimation of his estimated tax, as well as to the addition for failure to file a declaration.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 58 (a) and (b) and 294(d) (1) and (2) of the Internal Revenue Code of 1939 and Section 29.294–1 of Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, are set forth in the Appendix, *infra*, pp. 28–34.

STATEMENT

The facts are undisputed and may be briefly summarized as follows:

The taxpayer is an attorney. During the years 1947 through 1950 inclusive, he failed to file any declaration of estimated income tax. There was no reasonable cause for these failures. The Commissioner imposed two additions to the tax for each of the years involved, the one for failure to file a declaration, the other for substantial underestimation of his estimated tax. (R. 7, 8, 10, 16.) The Tax Court sustained the Commissioner's imposition of both additions. (R. 10.) The Court of Appeals affirmed with respect to the imposition of the addition (under Section 294(d) (1)(A)) for failure to file a declaration (R. 16–17), but reversed with respect to the addition (under Section 294(d)(2)) for substantial underestimation, holding that the latter could not be imposed in circum-

stances where the taxpayer is being penalized for non-filing (R. 17–20, 29–31).

SUMMARY OF ARGUMENT

A

In adopting a pay-as-you-go scheme of income taxation, Congress provided that taxpayers must estimate future income and pay periodically in accordance with their estimates. To implement these provisions, Congress further provided in the 1939 Code (here involved) for certain additions to tax: (1) If a taxpayer fails to file a timely declaration of estimated tax or if he fails to make the requisite quarterly payments in accordance with his estimate, he is subject to a penalty which may amount to as much as ten percent of the final tax; (2) if his estimate proves to be a substantial underestimate, *i.e.*, less than 80 percent of the final tax, he is subject to an addition amounting to six percent of the difference between the estimate and the final tax. The question presented here is whether both additions may apply to a case in which no estimate has been filed and there has been no satisfaction of the tax obligation (either by credits, withholdings or payments) during the taxable year.

In the Government's view, the ten percent addition for non-filing is a penalty for a breach of duty. Significantly, it may not be applied when the failure is "due to reasonable cause." The six percent addition, on the other hand, is in the nature of an interest charge. It applies whenever the Government is delayed in receiving those amounts which it would have

received had the taxpayer filed a substantially correct estimate and made timely payments thereunder. This charge applies whether or not there is reasonable cause for the underestimate. For purposes of applying the six percent addendum, the Government, in accordance with Treasury Regulations, treats the non-filing of a declaration as equivalent to a declaration that no tax is due.

Accordingly, the provisions for the two addenda are not mutually exclusive. Thus, a taxpayer who fails, for reasonable cause, to file a declaration pays no penalty, but is subject to the six percent addition. Conversely, a taxpayer may be subject to penalty for unexcused failure to file a declaration, although he is not subject to the six percent addendum. This occurs when credits or withholdings are sufficient in amount so that there is no substantial understatement within the statutory definition. (The six percent addendum applies only when the estimate, increased by designated credits, falls substantially short of the final tax.) As three circuits have held (the court below being the only appellate tribunal to rule otherwise), the two provisions for addition to tax are independent and both of them apply only in the following circumstances: (1) when the nonfiling is unexcused, and (2) the actual consequence is that the Government is delayed in receiving its revenues.

B

In 1943, contemporaneously with the enactment of the original legislation providing for pay-as-you-go taxation, the Treasury promulgated Regulations which

declared that, for purposes of applying the addendum for substantial underestimation, the taxpayer who fails to estimate shall be deemed to have estimated a tax of zero. Despite various legislative changes made during the life of the 1939 Code, at no time has Congress indicated disapproval of these Regulations. Accordingly, we submit, the Regulations must be given the effect of law unless they are found to be plainly inconsistent with the statute or unreasonable.

C

1. The statutory provisions involved provide intrinsic evidence that Congress has purposefully distinguished between the penalty for non-filing of a declaration and the addendum for substantial underestimation. This is shown by consistent separateness of treatment in the statute; by the significant difference in rates (ten percent—a typical penalty—as contrasted with six percent—the traditional rate of interest); and, perhaps most clearly, by the distinction which is drawn by the statute in relation to the element of fault or willfulness. Under the provisions relating to substantial underestimation, the rate (six percent) is stationary; the provisions are self-executing; and lack of fault is irrelevant. Under the discrete provisions dealing with non-filing, the measure of addition depends upon the duration of the violation; the addendum may amount to ten percent if the violation persists; and lack of fault is a complete defense.

2. The legislative history fully confirms the proposition that the applicable Treasury Regulations effec-

tuate the congressional purpose. The committee reports which accompanied the initial enactment of pay-as-you-go income taxation, discussing the addition for substantial underestimation, declare:

> In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision [substantial underestimation] will be zero.

The Treasury Regulations, which were promulgated shortly thereafter, adopted this authoritative expression of Congress *in haec verba*.

Nothing which Congress has said since that time is at variance with the view that it originally expressed. And when Congress, in enacting the 1954 Code, undertook to change the "addition" provisions, it expressly stated that, under the provisions of the 1939 Code, the two addenda "may run concurrently."

3. The Regulations are reasonable. Certainly, Congress and the administrative authorities could reasonably take the position "that those whose willful nonexcusable acts prevented the effective operation of the scheme of self-assessment and current payment ought to bear some additional disadvantage over the person whose arithmetic or prognostication was merely faulty." *Patchen* v. *Commissioner,* 258 F. 2d 544, 552 (C.A. 5th). This does not involve "double penalties." In the situation where both addenda apply, one is in the nature of compensation for the Government's delay in receiving revenue and the other is a penalty for breach of duty. Moreover, the latter (the ten percent addendum) rests upon an independent element—the taxpayer's fault in persistently ignoring

the law and failing to file. The same approach is reflected in other provisions of the Code of Internal Revenue.

It is no answer that if this taxpayer had filed a false declaration showing no tax due, he would have been subject only to the six percent addendum. That argument overlooks the fact that the criminal law imposes heavy sanctions for false swearing.

Concededly, Congress could have provided, had it chosen to do so, that the six percent addendum, which is in the nature of an interest charge, is to be forgiven in all cases where the provision for the ten percent penalty applies. The statute, however, evinces no such purpose; the provisions for the addenda are independent, not in the alternative. Moreover, the legislative history, as noted above, precludes such an interpretation. Congress declared (as did the Treasury in its Regulations) that, for purposes of computing the six percent addendum for substantial underestimation, no declaration is equivalent to a declaration of no tax. This, of course, necessarily contemplates that the addition for substantial underestimation may be imposed in the situation where no declaration has been filed.

ARGUMENT

PROVISIONS OF THE 1939 CODE AUTHORIZING ADDITIONS TO TAX FOR NON-FILING OF DECLARATION OF ESTIMATED TAX AND FOR SUBSTANTIAL UNDERESTIMATION OF TAX ARE NOT MUTUALLY EXCLUSIVE. IN THE CIRCUMSTANCES OF THIS CASE, BOTH PROVISIONS FOR ADDITION TO TAX ARE APPLICABLE.

A. INTRODUCTION

This case arises from Congress's adoption, in 1943, of a pay-as-you-go scheme of income taxation. That scheme, of course, necessarily contemplates that taxpayers estimate their income early in the taxable year and that they make periodic payments without awaiting the final computations which can only be made at the conclusion of the year. It requires, for its effective implementation, (*a*) that taxpayers make reasonable estimates, (*b*) that they pay periodically in accordance with these estimates, and (*c*) that the Government be compensated for its temporary loss of revenue in those instances when estimates, for one reason or another, prove substantially inadequate. These necessities find explicit and separate expression in the relevant statutory provisions.

Section 58 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 28–29) requires a taxpayer to file a declaration setting forth the amount which he estimates to be his tax for the current taxable year. Section 59 (26 U.S.C. 1952 ed., Sec. 59) requires quarterly payments of the estimated tax.

To enforce these requirements, Congress has provided that there shall be prescribed additions to tax in the event of non-compliance.

It has provided, *first*, for additions in the event of a failure to file a timely declaration *or* to make timely quarterly payments of the estimated tax. Section 294(d)(1) (A) and (B), Appendix, *infra*, pp. 29–30. These additions may amount to 10 percent of the tax.[1] *Ibid.* Significantly, the additions to tax authorized by this section are not to be imposed if the failure was "due to reasonable cause and not to willful neglect." *Ibid.*

Congress provided, *secondly*, that there shall be an addition to tax in the event of substantial underestimation. Section 294(d)(2), Appendix, *infra*, pp. 30–31. This takes place when the estimate proves to be less than eighty percent of the final tax liability.[2] *Ibid.* The addition for underestimation cannot exceed six percent.[3] As to this addition to tax, there is no forgiveness for reasonable cause.

In the instant case, taxpayer ignored his obligations completely in each of the years involved, making no declarations and paying no estimated taxes. The Commissioner imposed ten percent additions under Section 294(d)(1) (on the ground that there was an

[1] A taxpayer is subject to a five percent addition when the failure to file the declaration or to make the required quarterly payment occurs. There is an additional one percent addition for each month during which the breach of duty continues, subject to the limitation that the aggregate addition shall not exceed ten percent.

[2] An exception not here relevant makes somewhat different provision in the case of taxpayers who are farmers.

[3] Section 294(d)(2) provides that the addition shall be the lesser of two figures: (1) six percent of the amount by which the final tax exceeds the estimated tax; (2) the dollar amount by which eighty percent of the final tax exceeds the estimated tax.

unexcused failure to file declarations) and six percent additions under Section 294(d)(2) (on the ground that "no declaration" was tantamount to an estimate of "no tax" and that substantial understatements resulted).

The Tax Court upheld both sets of additions. The Court of Appeals sustained the ten percent additions for non-filing, but concluded that the six percent additions for substantial underestimation could not be sustained.[4] The view of the court below was that, although the Commissioner's action was authorized by the pertinent Regulations, it should not impute to Congress, in the absence of unequivocal statutory language (which it found lacking), a purpose to impose two "penalties" for one omission. (R. 30–31.) The court recognized that its holding was in conflict with the decisions of the three other courts of appeals which have passed upon the question: those of the Third Circuit (*Abbott* v. *Commissioner*, 258 F. 2d 537), the Fifth Circuit (*Patchen* v. *Commissioner*, 258 F. 2d 544), and the Ninth Circuit (*Hansen* v. *Commissioner*, 258 F. 2d 585, reversed on other grounds, 360 U.S. 446).[5]

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[4] Taxpayer's petition for certiorari was denied, 358 U.S. 940, and the application of the ten percent addition to tax is not in issue before this Court.

[5] The Commissioner's position has also been consistently upheld in the Tax Court. The district courts are seriously divided. For a collection of Tax Court and district court decisions, see the Government's petition for certiorari, page 6, notes 7–9. We note also that the Tax Court has reaffirmed its position since the date of the instant decision. See *Irby* v. *Commissioner*, 30 T.C. 1166.

We would stress, at the outset, that in our view this is not a case of "double penalties." The statutory provision for the six percent addition to tax for substantial underestimation is in the nature of a provision for the payment of interest. It serves to compensate the Government in all instances when the Government does not obtain timely receipt of that amount of money which it would have obtained had the taxpayer filed a reasonably accurate estimate and acted in accordance therewith. This is so whether or not the failure to obtain such receipt resulted from fault on the taxpayer's part.

In contrast, the ten percent addition for non-filing of a declaration or for non-payment of quarterly instalments is in the nature of a penalty for breach of duty.[6] That this provision is not in the nature of an interest charge is evidenced by (1) the fact that ten percent is not a normal rate of interest; (2) the fact that provision for this addition is discrete from the provision for addition to tax for substantial underestimation; and (3) the fact that this addition to tax may not be imposed when the failure to file or to pay was the result of reasonable cause, rather than willful neglect.

It is evident from what has just been stated that the six percent addition for substantial underestimation and the ten percent addition for non-filing are *not* mutually exclusive. A taxpayer who fails, for reasonable cause, to file a declaration does not pay

[6] Ten percent is the maximum figure. The percentage may be less if the violation is promptly discontinued. See p. 9, note 4, *supra*.

ten percent penalty; he is subject, however, to six percent addition.[7]

'onversely, a taxpayer may be subject to the ten cent addition, but not to the six percent addition. uppose, for example, that a taxpayer, without excuse, ails to file a declaration. Suppose, further, that he s a wage earner and that a portion of his salary is withheld each pay day (pursuant to sfatutory pro-isions for withholding) and that, as a result of nch withholding, the Government receives, during the xable year, eighty percent of the final tax.[8] In at circumstance, there is no substantial underesti-nation within Section 294(d)(2), and the six percent harge does not apply.[9] Nonetheless, on these facts, the taxpayer would be subject to an addition for failure

See *Patchen* v. *Commissioner*, 258 F. 2d 544 (C.A. 5th); *Kunsch* v. *Commissioner*, 258 F. 2d 585 (C.A. 9th), reversed on other grounds, 360 U.S. 146; *Hartley* v. *Commissioner*, 23 T.C. 555, opinion modified, 23 T.C. 564; *Shippen* v. *Commissioner*, 30 T.C. 416, currently on appeal to the Fifth Circuit. But see *Jones* v. *Wood*, 151 F. Supp. 678 (D. Ariz.) and *Wood* v. *United States*, 163 F. Supp. 426 (E.D. Tex.), which reached the anomalous conclusion that a taxpayer who neither files a declaration nor pays any instalment of estimated tax is excused from all additions where his failure to file is explained by "reasonable cause," although "reasonable cause" is no defense under Section 294(d)(2). See p. 18, note 18, *infra*.

[8] A variation of this illustration is provided by the situation where a taxpayer has a credit resulting from overpayment of tax in a previous year.

[9] Section 294(d)(2) begins with the words—"If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35) * * * exceeds the estimated tax (*increased by such credits*), there shall be added to the tax," etc. (Emphasis added.)

to file a declaration, amounting to ten percent of the excess of the correct tax over the amounts withheld, *i.e.*, ten percent of the difference between the final tax and eighty percent of that tax.[10]

It is true, of course, that where, as here, a taxpayer inexcusably fails to file a declaration of estimated tax *and* there is a tax due which goes unpaid (there being no withholding or other credit to satisfy the eighty percent obligation), he is subject, under the Government's theory, to the six percent charge (which we deem to be in the nature of an interest charge) and to the ten percent addition (which is in the nature of a penalty for breach of duty to file). In these circumstances, the two impositions serve separate functions, and both are authorized, as we shall point out in the succeeding section of this brief, by the applicable Regulations—Regulations which have congressional approval. As we shall further argue (*infra*, pp. 15–26), the Regulations are consistent with the underlying statute, with its history and with its purposes.

B. THE COMMISSIONER'S IMPOSITION OF THE TWO ADDITIONS RESTS ON LONG-STANDING TREASURY REGULATIONS

Treasury Regulations 9 (Section 29.294–1(b)(3) of Treasury Regulations 111, Appendix *infra*, p. 34) provide that if a taxpayer fails to file the required declaration of estimated tax, the amount of the estimate for purposes of determining the addition for substantial underestimation under Section 294(d)(2)

[10] Under Section 294(d)(1)(A), the ten percent for nonfiling is applied to the "correct tax reduced by the credit under sections 32 and 35" (withholding provisions).

shall be zero. In other words, for purposes of this section of the revenue laws, "no declaration" is deemed equivalent to a declaration of "no tax."

This regulatory provision was initially incorporated in Treasury Regulations in September 1943,[11] approximately three months after the "addition" provisions were first enacted into law. Although numerous changes in the 1939 Code dealing with these provisions were made by Congress in subsequent years[12] (*i.e.*, between 1943 and 1954), Congress has at no time indicated disapproval of the Regulations in question.[13] And the Treasury has maintained this feature of the Regulations without change throughout the life of the 1939 Code, although it has made numerous other changes in the regulatory provisions relating to estimation of tax.[14]

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[11] T.D. 5297, 1943 Cum. Bull. 243; T.D. 5305, 1943 Cum. Bull. 260.

[12] Revenue Act of 1943, c. 63, 58 Stat. 21, Section 118(a); Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sections 6(b)(8) and 13(b) and (e); Social Security Act Amendments of 1950, c. 809, 64 Stat. 477, Section 208(d)(8); Act of January 2, 1951, c. 1195, 64 Stat. 1136, Section 2; Revenue Act of 1951, c. 521, 65 Stat. 452, Section 103(b). And see discussion of the legislative history of Section 294(d), *infra*, pp. 19-23.

[13] As we also point out *infra*, pp. 19-20, the Regulations are in precise accord with expressions of congressional intent manifested in committee reports which accompanied the original legislation.

[14] See Section 29.294-1(b)(3) of Treasury Regulations 111, as added by T.D. 5305, 1943 Cum. Bull. 260, and as amended by T.D. 5403, 1944 Cum. Bull. 349, T.D. 5420, 1944 Cum. Bull. 355, T.D. 5448, 1945 Cum. Bull. 256, T.D. 5855, 1951-2 Cum. Bull. 141, and T.D. 5937, 1952-2 Cum. Bull. 171; and Section 39.294-1(b)(3) of Treasury Regulations 118.

Thus, we have here a regulatory provision adopted contemporaneously with the underlying statute and long continued in effect. As this Court has stated, Regulations "long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering* v. *Winmill*, 305 U.S. 79, 83.

In these circumstances, the Treasury Regulations must be sustained "unless unreasonable and plainly inconsistent" with the statute which they interpret. *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501. Here, we shall urge, the Regulations are both consistent and reasonable.

C. THE TREASURY REGULATIONS ARE CONSISTENT WITH THE STATUTE AND REASONABLY FULFILL ITS PURPOSE

1. *The language and the structure of the statute show that each of the two additions imposed has a distinct basis*

A reading of the statutory provisions furnishes "intrinsic evidence," as the Fifth Circuit has stated (*Patchen* v. *Commissioner*, 258 F. 2d 544, 552), that Congress has purposefully distinguished between the three categories of addition to tax (for a non-filing of declaration, for a non-payment of an instalment and for substantial underestimation).[15] With respect

[15] The *Patchen* opinion further states (*ibid*):

> There were three categories of defaulting taxpayers whom Congress plainly meant to reach: (1) those who, without reasonable excuse, failed to file any declaration of estimated tax, (2) those who, without reasonable excuse, failed to pay installments on the basis of the estimate and (3) those who failed to make an accurate estimate which would affect both (1) and (2).

to the distinctions between the addition for underestimation and the other two additions, we point particularly to the separateness of treatment in the statute; to the differences in rates and manner of application; and to the distinctions which are drawn in relation to the element of fault or wilfulness. These considerations point to the conclusion that the scheme is one which imposes a charge, in the nature of an interest charge, when the Government, whatever the reason, does not receive sufficient revenue at the time it should have been received and imposes separate and distinct additions for specified breaches of duty (non-filing or non-payment, without reasonable cause).

Provisions relating to estimation came into the law in 1943 when income tax collections were first put on a pay-as-you-go basis by the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Section 5. Section 294 of the Code, which is involved here, was revised some eight months later by the Revenue Act of 1943, c. 63, 58 Stat. 21, Section 118(a).[16] Section 294(d) remained in essentially the same form from that date until the adoption of the 1954 Code. Only the provisions enacted by the Revenue Act of 1943 are involved in this case. However, in order to give a full picture of the scheme of the statute, we shall summarize, first, the relevant provisions enacted by the earlier 1943 statute (the Current Tax Payment Act) and then deal with the changes made in the later enactment of the same year.

[16] In the interim, the Treasury Regulations described in the preceding section of this brief had been adopted.

The Current Tax Payment Act, Section 5(b), added paragraphs (3), (4) and (5) to Section 294(a) of the 1939 Code. Paragraph (3) provided that in the case of a failure to make and file a timely declaration there shall be added to the tax an amount equal to ten percent of the tax. Paragraph (4) provided that in the case of a failure to make a timely payment of any instalment of the estimated tax there shall be added to the tax the greater of $2.50 or two and one-half percent of the tax for each instalment due but unpaid. Paragraph (5) provided that if a taxpayer substantially underestimated his estimated tax, *i.e.*, if his estimated tax proved to be less than eighty percent of his final tax liability, there shall be added to the tax the lesser of six percent of the difference between the amount of the estimated tax and the final tax or the dollar amount of the difference.

The changes made by the Revenue Act of 1943 may be summarized as follows. *First*, that Act changed the arrangement of the provisions with respect to the three additions to the tax (incidentally removing the provisions from Section 294(a) and placing them in a new subsection, 294(d)). In place of three separate paragraphs, the additions for failure to file a declaration and for failure to pay an instalment were grouped together in subparagraphs (A) and (B) of Section 294(d)(1);[17] the addition for substantial underestimation was set forth separately in Section

[17] The language makes clear that these additions are alternative. Section 294(d)(1)(B), Appendix, *infra*, p. 30. See, also, p. 20, note 19, *infra*.

294(d)(2). *Second*, the measure of the additions to be imposed for failure to file and to pay were changed. In place of the different rates applicable for failure to file and for failure to pay, the same rates were made applicable to both. Also, in place of a fixed amount, the rates were graduated according to the length of time the violation continued, *i.e.*, five percent at the time of the breach, with an additional one percent for each successive month that it continues, the aggregate, however, not to exceed ten percent. On the other hand, no change was made in the measure of the addition to be imposed for substantial underestimation, and it remained a fixed rate (six percent) calculated upon the difference between the amount of the final tax liability and the amount of the estimate. *Third*, the Act explicitly provided that neither the addition for failure to file nor for failure to pay would apply where such failure was shown to be due to reasonable cause. No similar exculpatory provision was made applicable to the addition for underestimation.

As these provisions indicate, the six percent addition for underestimation makes the Government whole when it has been delayed, whatever the reason, in receiving its revenue. The rate is stationary; the provision is self-executing; and neither fault nor wilfulness is relevant.[18] Under the discrete provision deal-

[18] See *Kaltreider* v. *Commissioner*, 255 F. 2d 833, 839 (C.A. 3d); *Clark* v. *Commissioner*, 253 F. 2d 745, 751 (C.A. 3d); *McMurtry* v. *Commissioner*, 262 F. 2d 589 (C.A. 5th), affirming, *per curiam*, 29 T.C. 1091, 1094; *Smith* v. *Commissioner*, 20 T.C. 663; *Shippen* v. *Commissioner*, 30 T.C. 716, 730, appeal pending to the Fifth Circuit; *Ford* v. *Commissioner*, 29 T.C. 499, 506; *Hickman* v. *Commissioner*, 29 T.C. 864, 878.

ing with non-filing and non-payment, the measure of addition depends upon the duration of the violation: the addition may amount to ten percent—a penal figure—if the violation persists; and lack of fault is a complete defense.

2. *The Regulations conform precisely to the intent of Congress manifested in the legislative history*

The pertinent Regulations, as observed above, expressly provide that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision [Section 294(d)(2)] is zero" (Appendix *infra*, p. 34). There can be no question that this is consistent with the congressional purpose, for this is an instance in which the Regulations are phrased in precisely the same terms as appear in the authoritative expressions of Congress appearing in the relevant committee reports.

The initial legislation which provided for estimation of tax (the Current Tax Payment Act) also provided, as noted *supra* (p. 17), for three additions to tax. In the words of the accompanying committee reports (H. Rep. No. 401, 78th Cong., 1st Sess., pp. 37–38, 1943 Cum. Bull. 1283, 1311; S. Rept. No. 221, 78th Cong., 1st Sess., pp. 41–42, 1943 Cum. Bull. 1314, 1344–1345; H. Conference Rep. No. 510, 78th Cong., 1st Sess., pp. 55–56, 1943 Cum. Bull. 1351, 1372), "These paragraphs contain sanctions relating to the filing of declarations and payment of installments of estimated tax and to the proper estimate of tax." The Senate Report (No. 221, *supra*, p. 42; 1943 Cum. Bull. 1345) and the Conference Report (No. 510, *supra*, p. 56; 1943 Cum Bull.

1372), discussing the addition for substantial underestimation, go on to state:

> In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision [substantial underestimation] will be zero.

This, of course, necessarily contemplates that the addition for substantial underestimation may be imposed in situations where no declaration has been filed.

The reports accompanying the changes made by the Revenue Act of 1943 do not advert to the point. It is notable, however, that in the interim period between the two 1943 enactments, the Treasury had adopted its Regulations conforming precisely to the expression by Congress. It is also notable that the committee reports accompanying the later Act affirmatively state that the penalties for failure to file a declaration and for non-payment of an instalment due under a declaration (penalties which were grouped together in Section 294(d)(1)) are alternative and not cumulative, but make no similar statement with respect to the addition for underestimation.[7]

The statutory provisions relating to estimation of tax were revised in numerous particulars in the years between 1943 and the date of adoption of the 1954 Code. None of the revisions made any significant change in the dual provisions for addition to tax represented by Section 294(d)(1) and 294(d)(2), and nothing in the committee reports suggests views at

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[7] S. Rep. No. 627, 78th Cong., 1st Sess., pp. 21-22, 47-48 (1944 Cum. Bull. 973, 990, 1005-1006); H. Conference Rep. No. 1079, 78th Cong., 2d Sess., pp. 43-44 (1944 Cum. Bull. 1059, 1061-1062).

variance with the Treasury Regulations here involved.[20]

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[20] The amending statutes, together with the committee reports relating to each, are as follows:

Amendments to Section 58:

Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Section 13(a) [see H. Rep. No. 1365, 78th Cong., 2d Sess., pp. 30-31 (1944 Cum. Bull. 821, 844-845); S. Rep. No. 885, 78th Cong., 2d Sess., pp. 33-35 (1944 Cum. Bull. 858, 883-885)].

Revenue Act of 1945, c. 453, 59 Stat. 556, Section 102(b)(4) [see H. Rep. No. 1196, 79th Cong., 1st Sess., pp. 15-16 (1945 Cum. Bull. 595, 607); S. Rep. No. 655, 79th Cong., 1st Sess., p. 26 (1945 Cum. Bull. 621, 642); H. Conference Rep. No. 1100, 79th Cong., 1st Sess., p. 4].

Revenue Act of 1948, c. 168, 62 Stat. 110, Section 202(a) [see H. Rep. No. 1274, 80th Cong., 2d Sess., pp. 45-46 (1948-1 Cum. Bull. 241, 277-278); S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 50-51 (1948-1 Cum. Bull. 285, 321-325)].

Social Security Act Amendments of 1950, c. 809, 64 Stat. 477, Section 208(d)(4) [see S. Rep. No. 1669, 81st Cong., 2d Sess., pp. 153-154, 165 (1950-2 Cum. Bull. 302, 352-353, 361)].

Revenue Act of 1950, c. 994, 64 Stat. 906, Section 221(g) [see H. Rep. No. 2319, 81st Cong., 2d Sess., p. 104 (1950-2 Cum. Bull. 380, 455); S. Rep. No. 2375, 81st Cong., 2d Sess., p. 102 (1950-2 Cum. Bull. 483, 555)].

Amendment to Section 39:

Individual Income Tax Act of 1944, *supra*, Section 13(a) [see H. Rep. No. 1365, *supra*, pp. 31-32 (1944 Cum. Bull. 821, 845-846); S. Rep. No. 885, *supra*, pp. 35-36 (1944 Cum. Bull. 858, 885)].

Amendments to Section 294(d):

Individual Income Tax Act of 1944, *supra*, Sections 6(b)(8) and 13 (b) and (e) [see H. Rep. No. 1365, *supra*, p. 33 (1944 Cum. Bull. 821, 846); S. Rep. No. 885, *supra*, pp. 36-37 (1944 Cum. Bull. 858, 886-887)].

Social Security Act Amendments of 1950, *supra*, Section 208 (d)(8) [see S. Rep. No. 1669, *supra*, p. 165 (1950-2 Cum. Bull. 302, 361)]. [Cont'd. on following page.]

In the 1954 Code (which is not directly involved in this case), Congress eliminated the separate additions theretofore authorized for substantial underestimation and for failure to file a declaration or pay an installment. By Section 6654 (26 U.S.C. 1952 ed., Supp. V, Sec. 6654), it provided in their stead for a single addition based upon underpayment of the estimated tax and calculated at the rate of six percent of the amount of the underpayment.[21] See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 100–101, A397, A419 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4127–4128, 4544–4545, 4567); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 135–136, 592–593 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4769–4770, 5241–5243). In explaining this change, both the House Report (No. 1337, *supra*, p. 100; 3 U.S.C. Cong. & Adm. News (1954) 4017, 4127) and the Senate Report (No. 1622, *supra*, p. 135; 3 U.S.C. Cong. & Adm. News (1954) 4621, 4769), express the clear understanding of Congress that the 1939 Code authorized, in appropriate cases, an addition for underestimation and a concurrent addition for failure to file a declaration, stating:

Act of January 2, 1951, c. 1195, 64 Stat. 1136, Section 2 [see H. Rep. No. 3294, 81st Cong., 2d Sess.].

Revenue Act of 1951, c. 521, 65 Stat. 452, Section 103(b) [see S. Rep. No. 781 (Part 2), 82d Cong., 1st Sess., p. 3 (1951-2 Cum. Bull. 545, 546)].

[21] Section 6654 also explicitly provides that "section 294(d) of the Internal Revenue Code of 1939 shall continue in force with respect to taxable years beginning before January 1, 1955."

> Additional charges are imposed under the present law for failure to file a declaration or make a payment of the estimated tax or for substantial underestimates of tax liability. These charges may be severe. For failure to file a declaration or to pay an installment of the estimated tax, the total charge may be as high as 9 percent of the unpaid installment. For a substantial underestimate of tax, that is, an estimated tax which is less than 80 percent of the actual tax liability for the year (66⅔ percent in the case of farmers), a charge of 6 percent of the amount by which the final tax liability exceeds the estimated tax may be imposed. *This charge and the charge for failure to file a declaration or pay an installment of estimated tax may run concurrently and result in a combined charge of 15 percent of the estimated tax due.* [Emphasis added.]

Thus, from the time that pay-as-you-go provisions were incorporated in the 1939 Code (1943) until the present, the history uniformly supports the conclusion that the governing Treasury Regulations conformed to the intent of Congress.

3. *The Regulations are reasonable*

As the statutory scheme and legislative history (discussed above) show, the addition for underestimation must be regarded as being in the nature of an interest charge compensating the Government for delay in receiving those amounts which it would have received had taxpayer paid, each quarter, substantially one-fourth of his final tax liability. The separate addi-

tion for non-filing of a declaration (or non-payment thereunder) is for an unexcused breach of the duty to conform to the statutory scheme of assessment and current payment. Assuredly, Congress (and the Treasury, in implementing the statute) could reasonably take the position "that those whose willful non-excusable acts prevented the effective operation of the scheme of self-assessment and current payment ought to bear some additional disadvantage over the person whose arithmetic or prognostication was merely faulty," *Patchen v. Commissioner*, 258 F. 2d 544, 552 (C.A. 5th).

This does not involve a scheme of "double penalties." To begin with, since the incidence of the two types of additions differs, there are cases in which the six percent addition will apply and the ten percent addition will not; there are also instances in which the converse results. See pp. 11–13, *supra*. Moreover, in those cases (such as the instant one) where, under the Government's view, both additions are applicable, this is so only because the taxpayer's conduct has more than one element. The six percent addition rests upon delay in the Government's receipt of those amounts which it would have received had the taxpayer filed a substantially correct estimate and made timely payments thereunder. The ten percent addition rests upon an independent factor—the taxpayer's fault in persistently ignoring the law and failing to file.

Such a legislative approach is hardly novel. Indeed, it finds its counterpart in other provisions of the 1939 Code. For example, a taxpayer is liable for interest under Sections 292 and 294 (a) and

(b) (26 U.S.C. 1952 ed., Secs. 292, 294) when he has failed to pay, has underpaid or has paid late the amount of his final tax liability. He may also be subject to additions under Section 291 of the 1939 Code (26 U.S.C. 1952 ed., Sec. 291) for failure to file a return, and under Section 293(b) (26 U.S.C. 1952 ed., Sec. 293) for fraud. See *Rocrich* v. *Commissioner*, 38 B.T.A. 567, 583–584, affirmed, 115 F. 2d 39 (C.A.D.C.), certiorari denied, 312 U.S. 700; *Foxel* v. *Commissioner*, decided November 17, 1950 (1950 P-H T.C. Memorandum Decisions, par. 50,281); *Page* v. *Commissioner*, decided May 10, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,147); *McGovern* v. *Commissioner*, decided January 7, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,001); *Mindell* v. *Commissioner*, decided January 26, 1955 (1955 P-H T.C Memorandum Decisions, par. 55,017); *Lucido* v. *Commissioner*, decided January 31, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,023). See, also, *United States* v. *Ridley*, 127 F. Supp. 3, 11 (N.D. Ga.).[22]

There is no inequity, we submit, in holding that one who inexcusably failed to file a declaration—thus withholding information from the Government and impeding the operation of the scheme for current payment of income taxes—should be subject to

[22] Congress has ordinarily attempted to declare the instances in which additions are not to be concurrently imposed. See *e.g.*, Section 293(a) of the 1939 Code, which prohibits the Commissioner from imposing interest on a deficiency and an addition for negligence. Similarly, under the 1954 Code, instances where the Commissioner may not impose concurrent additions for the same act, as for delinquency and fraud, are clearly set forth in the statute. See Section 6653(d) (26 U.S.C. 1952 ed., Supp. V, Sec. 6653(d)).

ddition separate and apart from the addition
is imposed upon one who, though he has under-
ted (perhaps inadvertently), has nonetheless
lied with the specific requirement that he file
laration. Nor is it an answer to say that it
fair to impose the two additions in the instant
ion because taxpayer could have limited the
addendum to six percent by filing a false decla-
n showing no tax due. There are criminal pen-
for false swearing.

is true that Congress, in dealing with situations
as the one at bar, might have chosen to realize
rposes by providing for the ten percent addi-
n lieu of the six percent "interest" charge,
nposing, in effect, a four percent penalty, rather
ten percent penalty, for failure to file a
tion—which is the effect of the decision below.
s not appear from the statute that Con-
roposed to do so. The six percent addi-
l the ten percent addition are independently
and independently provided for; they are not
lternative. Moreover, the legislative history
riginal enactment and the continued approval
ress of the Treasury Regulations demonstrate,
ve, that the statute is not to be otherwise
ted.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AUGUST 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 58 [As added by Sec. 5, Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and as amended by Sec. 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, and Sec. 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110]. DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500 plus $600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.[1]

(b) *Contents of Declaration.*—In the declaration required under subsection (a) the individual shall state—

[1] Prior to the amendment by Section 202(a) of the Revenue Act of 1948, *supra*, the amounts set forth in subparagraphs (1) and (2) of subsection (a) were $5,000 and $500, and $100 and $500, respectively.

(1) the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under sections 32 and 35 for taxes withheld at source;

(2) the amount which he estimates as the credits for the taxable year under sections 32 and 35; and

(3) the excess of the amount estimated under paragraph (1) over the amount estimated under paragraph (2), which excess for the purposes of this chapter shall be considered the estimated tax for the taxable year.

The declaration shall also contain such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury.

* * * * *

(26 U.S.C. 1952 ed., Sec. 58.)

SEC. 294 [As added by Sec. 118(a), Revenue Act of 1943, c. 63, 58 Stat. 21, and as amended by Secs. 6(b)(8), and 13(b) of the Individual Income Tax Act of 1944, *supra*, Sec. 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136]. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(d) *Estimated Tax.*

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid,

1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credit under sections 32 and 35.

(B) *Failure to Pay Installments of Estimated Tax Declared.*—Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section

60(a), or 66⅔ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60(a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the 80 per centum and 66⅔ per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 294.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.294–1 [As added by T.D. 5305, 1943 Cum. Bull. 260, and amended by T.D. 5403, 1944 Cum. Bull. 349, and T.D. 5420, 1944 Cum. Bull. 355] *Additions to the tax.*—(a) *General.*—Section 294(d) provides for certain additions to the tax in the case of—

(1) failure to file timely a declaration of estimated tax;

(2) failure to pay within the time prescribed any installment of declared estimated tax; and

(3) substantial underestimate of the estimated tax.

These additions to the tax are in addition to any applicable criminal penalties.

(b) *Additions for specific failures on the part of the taxpayer with respect to the estimated tax.*—(1) *Failure to file declaration.*—Section 294(d)(1)(A) provides for an addition to the tax in the case of a failure to make and file a declaration of estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax shall be in an amount equal to 5 per cent of the unpaid amount of each installment and in addition 1 per cent of the unpaid amount of the installment for each month (except the first) or fraction thereof during which such amount remains unpaid. Such addition to the tax with respect to any installment due but unpaid shall not exceed 10 per cent of the unpaid portion of such installment. For the purposes of section 294(d)(1)(A) the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the

correct tax reduced by the credits for tax withheld at source.

* * * * *

(2) *Failure to pay installment of declared estimated tax.*—Section 294(d)(1)(B) provides for an addition to the tax in the case of the failure to pay an installment of the declared estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax is applicable to delinquency in payment only (1) where a timely declaration of estimated tax has been made and filed or (2) where the Commissioner has found that the failure to make and file a timely declaration was due to reasonable cause and not to willful neglect. Such addition to the Tax shall be in an amount equal to 5 per cent of the unpaid amount of each installment of declared estimated tax and in addition 1 per cent of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. The addition to the tax is limited with respect to any installment due but unpaid to 10 per cent of the unpaid portion of such installment. Such addition to the tax is not applicable in cases to which the addition to the tax under section 294(d)(1)(A) applies.*

* * * * *

(3) *Substantial understatement of estimated tax.*—Section 294(d)(2) provides for an addition to the tax in the case of a taxpayer who makes a substantial underestimate of tax on his declaration. Such addition to the tax shall not apply to the taxable year in which falls the death of the taxpayer.

For the taxable years beginning after December 31, 1942, except as hereinafter provided—

(A) In the case of individuals, other than those exercising the election under section 60(a), relating to farmers, an addition to the tax under section 294(d)(2) is applicable in the event that the amount of the estimated tax (increased by the amount of the credit for taxes withheld at source on wages and the credit under section 32) is less than 80 per cent of the tax imposed by Chapter 1 for the taxable year (determined without regard to such credits). In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

* * * * *

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

No. 13.

OCTOBER TERM, 1959.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

FRED N. ACKER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT.

FRED N. ACKER,
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BRIEF OF RESPONDENT.

The Petitioner's brief can be summarized as follows:

1. An open admission that the wording of the statute in itself does not impose a double penalty.

2. Nevertheless a double penalty ought to be imposed in the circumstances of this case for the following reasons:

(a) The Regulations provide for it.

(b) The Legislative Conference Report contains language identical to the Regulations.

(c) Congress has not specifically interfered with Treasury in administratively imposing the double penalty.

(d) The additional penalty at the rate of 6% is in the nature of interest and therefore no injustice is done.

More noteworthy than anything that is said on the positive side of the Government's case is the complete absence of any citation that sustains the philosophy of their position and at the same time supports it by a thoroughgoing and reasoned opinion.

Over and above this it strikes this Respondent that if it takes 27 pages of explanation to support their contention for a double penalty that is not expressly stated in the statute then the power to impose the double penalty does not in fact exist.

Quite properly the whole thing can be put down to administrative overinterpretation.

The argument of the Government that the statute should be expanded to include the Treasury Regulations and the Legislative Conference Report is legally unsound because there is nothing in the statute that is ambiguous. There is no need for interpretation. What the Petitioner is trying to introduce is an entirely new concept. Secondly, to impute to Congress an intent about anything in the Internal Revenue Code beyond a rough knowledge of the prevailing rates is to distort fact out of all reality. The Treasury writes or directly inspires the Conference Report, the Code itself and, of course, the Regulations.

Frankly, everybody including the Treasury is lost in the sea of their own confusion when it comes to the Internal Revenue Code. To my best knowledge the Treasury has not to this day been able to write a full set of Regulations for the 1954 Revenue Code, a Code that was advertised as clearing up the disputes in the 1939 Code. Now, if the Treasury does not itself understand its own work how can it impute such knowledge to the Congress?

The Government's argument that the silence of the Congress sanctifies the administrative imposition of the double penalty is far fetched. Firstly, the Congress also

watches the decisions of the Courts, where on balance the Government is the loser. Secondly, the record of the Congress is full of promises of a thorough-going overhauling of the Internal Revenue Code. But it always gets lost in the heat of the Washington summer, which phrase is used to cover a multitude of legislative omissions.

The final argument of the Government that the double penalty is in the nature of interest and therefore ought to be upheld is totally unsound. Why any thinking lawyer would spend three whole pages of a brief discussing the non-pertinent question of interest and then refer and re-refer to it constantly leaves the writer puzzled. Just how far can reason be stretched before all logic ceases? To call it interest or like interest does not justify anything. Either Congress has definitely imposed a penalty or it has not. It is not a case of maybe this or maybe that but a case of yes or no.

RESPONDENT'S ARGUMENT.

The Respondent's position can be plainly stated. The Statute provides for two distinct situations and an equally distinct penalty for each situation as follows:

1. 10%, for failure to file an estimate.

2. 6%, for an underestimate of the estimate with a 20% factor of error.

If we apply one of the very oldest maxims of interpretations we get a self-evident answer. "The express mention of one thing is the exclusion of the other."

Frankly, there is little else that needs be said. However, we might indulge in a little logic and say that "the whole includes all of the parts."

Let us look at the question affirmatively. If Congress either with or without the so-called Conference Reports

wanted to impose a double penalty they could have done so plainly and in a single sentence. Not having done so it does not lie in anyone's power to put it in their mouth. Nor is it necessary to remind this Court that penalties are not favored in the law unless they are clearly expressed.

THE CASES.

We do not trouble the Court by citing a series of cases either pro or con, because the cases themselves have very little meat in them. Why? Because the cases were preponderately over other questions and penalties were side issues. The opinions themselves treat the penalties in this light and little space or none is spent in discussing them beyond declining or granting the penalty. We do however append as an appendix that part of the Court of Appeals decision in the instant case (258 F. 2nd 568) referring to penalties because it does attempt to analyze and weigh the respective merits pertinent to this situation.

Respectfully submitted,

FRED N. ACKER,

Pro Se.

APPENDIX.

Excerpts from Opinion of the United States Court of Appeals for the Sixth Circuit in the Case of Acker v. Commissioner, 258 F. 2d 568.

For the years 1947 through 1950 respondent imposed on petitioner and the Tax Court sustained additions to tax both under § 294(d)(1)(A) for failure to file a declaration of estimated tax, and under § 294(d)(2) for substantial underestimation of estimated tax. Petitioner does not rely on the statutory excuse of "reasonable cause and not . . . willful neglect" to justify his failure to file the declarations. Rather, he maintains that the statutory provisions requiring the filing of a declaration of estimated tax are unconstitutional because "the enumerated powers of the Congress do not include any power to compel a citizen to prophesy. It is beyond any human ability and therefore not a subject for Congressional intervention."

Since petitioner makes no attempt to establish the statutory excuse, the Tax Court correctly applied the statute in sustaining imposition of the additions to tax under § 294(d)(1)(A) for failure to file the declarations of estimated tax. And we hold with the Tax Court that petitioner's attack upon the constitutionality of the provisions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax, and imposing penalties for failure to file, is "wholly without merit." Such requirements are a valid exercise of the taxing power conferred by Article I, § 8, and the Sixteenth Amendment of the Constitution. [*Erwin v. Granquist*, 253 F. (2d) 26 (9th Cir. 1958); *Walker v. United States*, 240 F. (2d) 604 (5th Cir.), *cert denied*, 354 U. S. 939 (1957).]

Petitioner next contends that imposition of concurrent penalties under §§ 294(d)(1)(A) and 294(d)(2) of the 1939 Code is without statutory warrant. The Tax Court held that petitioner's failure to file any estimate at all amounted to a zero estimate which, in turn, resulted in a substantial underestimate within the purview of § 294(d)(2). This holding is in accord with Treasury Regulation 111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)], and is supported by a long line of Tax Court decisions [see, among others: *Clarence F. Buckley*, 29 T. C. No. 50 (1957); *Marcel Garsaud*, 28 T. C. 1086, 1090 (1957); *Harold C. Marbut*, 28 T. C. 687, 692 (1957); *J. D. Abbott*, 28 T. C. 795, 808-809 (1957); *Anthony Delsanter*, 28 T. C. 845, 861-862 (1957); *Walter H. Kaltreider*, 28 T. C. 121, 126 (1957); *Marvin Maxey*, 26 T. C. 992, 996 (1956); *Harry Hartley*, 23 T. C. 353, 360, *modified*, 23 T. C. 564 (1954); *G. E. Fuller*, 20 T. C. 308, 316 (1953), *aff'd., on other grounds*, 213 F. (2d) 102 (10th Cir. 1954)]; and by some District Court decisions [*Palmisano v. United States*, 159 F. Supp. 98 (E. D. L. A. 1958); *Farrow v. United States*, 150 F. Supp. 581 (S. D. Cal. 1957); *Peterson v. United States*, 141 F. Supp. 382 (S. D. Tex. 1956)].

While this Court has affirmed three Tax Court decisions which have sanctioned imposition of penalties under both § 294(d)(1)(A) and § 294(d)(2) where no declaration of estimated tax had been filed, examination of the briefs and appendices in these cases discloses that the propriety of imposing the penalty for substantial underestimation where no estimate at all had been filed was not raised in this Court. [*John Federika*, 14 CCH Tax Ct. Memo. 652, 658 (1955), *aff'd., per curiam*, 237 F. (2d) 916 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957); *Robert Fogel*, 14 CCH Tax Ct. Memo. 718, 728 (1955), *aff'd., per curiam*, 237 F. (2d) 918 (6th Cir. 1956); *R. M.*

Clayton, 15 CCH Tax Ct. Memo. 105, 109 (1956), *aff'd.*, per *curiam*, 245 F. (2d) 238 (6th Cir. 1957).| The question remains open for examination then as *res integra* here.

Even though this problem of concurrent penalties exists only under the 1939 Code, and cannot arise under the 1954 Code which expressly provides but a single penalty for underpayment of estimated tax |Int. Rev. Code of 1954, §§ 6651(c), 6654, and see 3 U. S. Code Cong. & Ad. News (1954) 4544, 4567, 5241-5242|, the problem remains an important one because of cases yet to be decided which will be ruled by the 1939 Code |see Int. Rev. Code of 1954, § 6654(h)|.

The argument in support of the validity of that part of Treasury Regulation 111 § 29.294-1(b)(3)(i) |26 C.F.R. (1949)| declaring that "|i|n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero," has been well stated in *Palmisano v. United States*, *supra*, 159 F. Supp. 98, and *Farrow v. United States*, *supra*, 150 F. Supp. 581. |See also *G. E. Fuller*, *supra*, 20 T. C. at 316.|

But to give effect to the quoted regulation presents a problem even greater than the logical difficulty encountered in saying that one who has filed no estimate at all has thereby underestimated his tax. |See *Barnwell v. United States*, 58-1 U.S.T.C. Par. 9374 (E. D. S. C. Feb. 4, 1958).| For although the Congress treated failure to file a declaration of estimated tax and substantial underestimation of tax as separate and distinct acts under the 1939 Code, and provided separate and different penalties for each, the regulation renders a taxpayer who has failed to file a declaration ipso facto subject to both the penalty for failure to file and the penalty for substantial underestimation. As the Tax Court itself observed in rebuffing

another attempt of respondent to extend these penalties by implication: "If the legislature had intended such a result it would have had been a simple matter so to provide." [*Anthony Delsanter, supra*, 28 T. C. at 862.]

Moreover, inasmuch as the regulation imposes a penalty in addition to one expressly imposed by the statute itself for the same omission, we are unable to perceive wherein the regulation is necessary to effectuate the statutory taxing scheme. Section 294(d) of the Internal Revenue Code of 1939 is penal in nature and to be strictly construed. [*Stephan v. Commissioner*, 197 F. (2d) 712 (5th Cir. 1952); *Barnwell v. United States, supra*, 58-1 U.S.T.C. Par. 9374; *Davis v. Dudley*, 124 F. Supp. 426, 429 (W. D. Pa. 1954); see *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284, 296 (1954).] "Penalties are never extended by implication" [*Elliott v. Railroad Co.*, 99 U. S. 573, 576 (1878); *United States v. J. H. Winchester & Co.*, 40 F. (2d) 472 (2d Cir. 1930)], and "all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfried, Inc. v. Commissioner*, 162 F. (2d) 628, 633 (3rd Cir. 1947).]

Furthermore, even if the exactions involved be treated as "additions to Tax," as they are denominated by § 294 of the 1939 Code, the regulation runs counter to the long established rule that "statutes levying taxes . . . are not to be extended by implication beyond the clear import of the language used." [*United States v. Merriam*, 263 U. S. 179, 187-188 (1923); *Crooks v. Harrelson*, 282 U. S. 55, 61 (1930); *Reinecke v. Gardner*, 277 U. S. 239, 244 (1928); *Gould v. Gould*, 245 U. S. 151, 153 (1917); *cf. Parker Pen Co. v. O'Day*, 234 F. (2d) 607, 609 (7th Cir. 1956).]

Mindful of the cogent reasoning of the Tax Court and District Court opinions sustaining the regulation, we nevertheless are of opinion that Treasury Regulation

111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)] is invalid insofar as it provides that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero." In so holding we are mindful too that, as the Tax Court and the District Courts have pointed out, Treasury regulations are presumptively valid. But we think that in this instance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, "unreasonable and plainly inconsistent with the revenue [statute]," and so cannot be sustained. [*Commissioner v. South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).]

This conclusion is buttressed by the fact that it is in accord with that reached by the majority of the District Courts which have considered the problem. [*Barnwell v. United States*, *supra*, 58-1 U. S. T. C. Par. 9374; *Erwin v. Granquist*, 57-2 U. S. T. C. Par. 9732 (D. Ore. 1957), *aff'd.*, 253 F. (2d) 26 (9th Cir. 1958); *Powell v. Granquist*, 146 F. Supp. 308, 312 (D. Ore. 1956), *aff'd.*, 252 F. (2d) 56 (9th Cir. 1958); *Jones v. Wood*, 151 F. Supp. 678 (D. Ariz. 1956); *Stenzel v. United States*, 150 F. Supp. 364 (N. D. Cal. 1957); *Hodgkinson v. United States*, 57-1 U. S. T. C. Par. 9294 (S. D. Cal. 1956); *Owen v. United States*, 134 F. Supp. 31, 39 (D. Neb. 1955), *modified on another point sub nom. Knop v. United States*, 234 F. (2d) 760 (8th Cir. 1956); *Todd v. United States*, 57-2 U. S. T. C. Par. 9768 (N. D. Ga. 1957); *Glass v. Dunn*, 56-2 U. S. T. C. Par. 9840 (N. D. Ga. 1956); *United States v. Ridley*, 127 F. Supp. 3, 11 (N. D. Ga. 1954); *United States v. Ridley*, 120 F. Supp. 530, 538 (N. D. Ga. 1954).]

The judgment of the Tax Court must therefore be reversed as to the additions to tax under § 292(d)(2).

Respondent, however, now advances the contention that "the Treasury Regulation in question could hardly be inconsistent with the statute . . . because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute." [Compare Treasury Regulation 111 § 29.294-1(b)(3)(i), 26 C.F.R. (1949) with S. Rep. No. 221, 78th Cong., 1st Sess. 42 (1943 Cum. Bull. 1314, 1345), and H. R. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943 Cum. Bull. 1351, 1372).]

Respondent also calls to our attention the recent decisions of *Patchen v. Commissioner*, F. 2d (5th Cir., July 23, 1958). *Abbott v. Commissioner*, F. 2d (3rd Cir., July 31, 1958), and *Hansen v. Commissioner*, F. 2d (9th Cir., Aug. 4, 1958). These decisions, rendered subsequent to the publication of our opinion in this case, express disagreement with our holding that the penalty for failure to file a declaration of estimated tax [Int. Rev. Code of 1939 § 294(d)(1)(A)] and the penalty for substantial underestimation of estimated tax [*id.* § 294-(d)(2)] cannot be imposed concurrently so as to work the exaction of a double penalty.

In the *Patchen* case the learned Court of Appeals for the Fifth Circuit appears to credit as authority decisions of this Court in which the problem was never raised. [See footnote 15 citing *Fogel v. Commissioner*, 237 F. 2d 918 (6th Cir. 1956) and *Clayton v. Commissioner*, 245 F. 2d 238 (6th Cir. 1957). See also 3 Roehner, Federal Taxation Par. 153 at page 191 (Aug. 8, 1958).]

In the *Abbott* case the learned Court of Appeals for the Third Circuit recognizes that: "An examination of the underestimation provisions of Section 294(d)(2), taken alone, leaves unanswered the question of whether the penalty provided should be imposed where no declaration of

estimated tax is filed." |*Abbott v. Commissioner*, *supra*, F. 2d at | The Court then observed that "|t|he statute being ambiguous, resort to legislative history is proper in an endeavor to ascertain Congressional intent". |*ibid.*|; and concluded from the legislative history that the Congress intended the double penalty since "the regulation is precisely in accord with the Congressional intent expressed in the conference report." |*Ibid.*|

In the *Hansen* case the learned Court of Appeals for the Ninth Circuit likewise concluded from the legislative history that "|n|o other conclusion is possible but that Congress intended" to provide in the Act for the double penalty. |*Hansen v. Commissioner*, *supra*, F. 2d at .|

However, it has long been our view that "|such an| intention of the Congress must be gathered from the language of the Act. . . ." |*United States v. Stroop*, 109 F. 2d 891, 893 (6th Cir. 1940); see also *Hopkins v. Commissioner*, 144 F. 2d 683, 692 (6th Cir. 1944).|

"Further," as the Court of Appeals for the Third Circuit has pointed out on another occasion, "it is well-settled that in the application of penalties, 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.'" |*Hatfried, Inc. v. Commissioner*, 162 F. 2d 628, 633 (3rd Cir. 1947).|

While our great respect for the learning and acumen of the Courts of Appeals for the Third, Fifth, and Ninth Circuits naturally gives us pause, we are nonetheless of opinion that the challenged regulation authorizing imposition of double penalties cannot be validated by the fact that it is substantially a quotation from the Congressional committee reports.

It seems to us a policy of first order that taxpayers under this "government of laws and not of men" be en-

titled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval. [U. S. Const. Art. I, §§ 7, 8, clause 1; Amend. XVI; see *Langstaff v. Lucas*, 9 F. 2d 691, 692-693 (W. D. Ky. 1925), *aff'd upon the opinion of the District Court*, 13 F. 2d 1022 (6th Cir.), *cert. denied*, 273 U. S. 721 (1926); *Masonite Corp. v. Fly*, 194 F. 2d 257, 260 (5th Cir. 1952); *Helvering v. Rebsamen Motors, Inc.*, 128 F. 2d 584, 587-588 (8th Cir. 1942).]

Especially is this so where, as in the case at bar, the penalty sought to be imposed by administrative regulation is cumulative with and in addition to another penalty clearly and expressly imposed by the statute for the identical omission. Such a regulation is an attempted expansion and extension of the statute tantamount to an amendment thereof, and neither "presumptions of validity" nor "reenactment doctrines" can serve to validate it. [*United States v. Calamaro*, 354 U. S. 351, 358-359 (1957); *Koshland v. Helvering*, 298 U. S. 441, 446-447 (1936); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U. S. 129, 134-135 (1936); *Lincoln Elec. Co. Employees' Profit-Sharing Trust v. Commissioner*, 190 F. 2d 326, 330 (6th Cir. 1951); *Langstaff v. Lucas*, *supra*, 9 F. 2d at 692-693; see *United States v. Abrams*, 197 F. 2d 803, 805 (6th Cir.) *cert. denied*, 344 U. S. 855 (1952).]

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law." [*Morrill v. Jones*, 106 U. S. 466, 467 (1882).]